No. 86-198

Supreme Court, U.S.
FILED
AUG 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD A. HAFFER,
PETITIONER

v.

ACTION MANUFACTURING, INC.,
FAIRHAVEN TEXTILE CORPORATION,
AND BRAWER BROS., INC.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STEPHEN E. WEYL, *Counsel of Record*
EDWARD A. HAFFER
MARILYN L. BUTLER
SHEEHAN, PHINNEY, BASS & GREEN,
PROFESSIONAL ASSOCIATION
1000 Elm St., P.O. Box 3701
Manchester, New Hampshire 03105
(603) 668-0300
Counsel for Petitioner

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

Questions Presented

1. In requiring that a defendant's counsel automatically notify the plaintiff of any anticipation that the plaintiff will fail to prove an element of its case, has a Federal Court of Appeals contravened certain provisions of the Federal Rules of Civil Procedure and the work-product doctrine, and brought Fed. R. Civ. P. 16 into conflict with that doctrine?

2. When counsel's conduct complied with the Federal Rules of Civil Procedure and was otherwise well grounded in fact and law, did the Court of Appeals exceed its authority under 28 U.S.C. § 1927 in punishing him for not anticipating its automatic-notification rule?

Table of Contents

Questions Presented i

Opinions Below 1

Jurisdiction 1

Constitutional Provisions, Statutues, and Rules Involved 1

Statement of the Case 1

Reasons for Granting the Writ 6

I. In requiring that a defendant's counsel automatically notify the plaintiff of any anticipation that the plaintiff will fail to prove an element of its case, the Court of Appeals has contravened certain provisions of the Federal Rules of Civil Procedure and the work-product doctrine. The decision is in conflict with the rules prescribed by this Court under 28 U.S.C. § 2072; is in conflict with *Hickman v. Taylor*, 329 U.S. 495 (1947); and presents an important, unresolved question on the application of the work-product doctrine to Fed. R. Civ. P. 16. 6

A. Neither Rule 8(c) nor Rule 15(a) required the defendant to notify the plaintiff of the anticipated failure of proof. These rules are vitiated by the Court's new requirement of automatic notification. 8

B. Rule 16, as properly applied by the District Court in its discretion, did not require the defendant to specifically notify the plaintiff of the anticipated failure of proof. This proper application of the rule is vitiated by the Court of Appeals' new requirement of automatic notification. Moreover, through that requirement, the Court of Appeals has usurped the discretion of the District Court in the management of pretrial proceedings. 9

C. Neither Rule 15(b) nor principles of orthodox trial practice required the defendant to notify the plaintiff of the anticipated failure of proof. This rule and these principles are vitiated by the Court's new requirement of automatic notification. 12

D. The Court's new requirement of automatic notification contravenes the work-product doctrine of *Hickman v. Taylor*, and brings Rule 15 into conflict with that doctrine. 16

II. When counsel's conduct fully complied with the Federal Rules of Civil Procedure and was otherwise well grounded in fact and law, the Court of Appeals exceeded its authority under 28 U.S.C. § 1927 in punishing him for not anticipating its automatic-notification rule. The decision constitutes a grave miscarriage of justice, calling for guidlines that protect against the punishment of responsible advocacy, and calling also for an exercise of this Court's power of supervision. 20

Conclusion 28

Appendix (under separate cover)

Table of Authorities

CASES

Aetna Life Insurance Co. v. Lavoie, 54 U.S.L.W. 4381 (1986) 27

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 27

Brandon v. Holt, 469 U.S. 464 (1985) 13

Celotex Corp. v. Catrett, 54 U.S.L.W. 4775 (1986) 11, 22, 26

Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975) 18

Eastern Airlines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976) 8, 10, 23

F.T.C. v. Grolier, Inc., 462 U.S. 19 (1983) 18

George Cohen Sons & Company v. Koch, 376 F.2d 629 (1st Cir. 1976) 15

Hickman v. Taylor, 329 U.S. 495 (1947) 8, 11, 12, 16, 17, 18 19, 20, 27

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 27

K & M Joint Venture v. Smith International, Inc., 669 F.2d 1106 (6th Cir. 1982) 8

Mariner Water, Etc. v. Aqua Purification, Etc., 665 F.2d 1066 (D.C. Cir. 1981) 10

Miner v. Atlass, 363 U.S. 641 (1960) 19

Paul v. Davis, 424 U.S. 693 (1976) 27

Royal Typewriter Co. v. Xerographic Supplies, 719 F.2d 1092 (11th Cir. 1983) 8, 10

Standard Alliance Ind. v. Black Clawson, 587 F.2d 813 (6th Cir. 1978), cert. denied, 441 U.S. 923 (1979) 8, 10, 11

Talamini v. All-State Insurance Co., 105 S. Ct. 1824 (1985) 23, 28

Thompson v. City of Louisville, 362 U.S. 199 (1960) 23, 27

Upjohn Co. v. U.S., 449 U.S. 383 (1981) 18

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 27

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332 2

28 U.S.C. § 1651(a) 1

28 U.S.C. § 1927 1, 2, 5, 20, 23

28 U.S.C. § 2072 1, 19
N.H. Rev. Stat. Ann. 382-A:2-607(3)(a) 1, 2, 10, 13, 15, 21, 22, 26
N.H. Rev. Stat. Ann. 382-A:2-612(1) 1, 2, 23
N.H. Rev. Stat. Ann. 382-A:2-714(1) 1, 2, 10, 13, 22, 26

RULES

Sup. Ct. R. 26 1
Sup. Ct. R. 27.4 1
Fed. R. App. P. 38 23
Fed. R. Civ. P. 1 13
Fed. R. Civ. P. 7(a) 9
Fed. R. Civ. P. 8(c) 7, 8, 9, 24
Fed. R. Civ. P. 15(a) 7, 9, 24
Fed. R. Civ. P. 15(b) 7, 8, 12, 13, 14, 15, 24
Fed. R. Civ. P. 16 7, 9, 10, 11, 12, 16, 18, 19, 20
Fed. R. Civ. P. 16(c) 19
Fed. R. Civ. P. 16(f) 11
Fed. R. Civ. P. 26(b)(3) 17, 18
Fed. R. Civ. P. 33 18
Fed. R. Civ. P. 36 18
Fed. R. Civ. P. 56 22
Fed. R. Civ. P. 83 11
N.H. Local Rule 10(b) (D.C.N.H. 1980) 10

TREATIES AND TEXTS

3 I. Goldstein & F. Lane, Trial Techniques ch. 19 (2d ed. 1969) 14
3 I. Goldstein & F. Lane, Trial Techniques §§ 19.17-19.20 (2d ed. 1969) 14

L. Hand, The Spirit of Liberty, Papers and Addresses of Learned Hand (I. Dilliard coll. 1952) 28

J. L. Kestler, Questioning Techniques and Tactics (1982) 15

2A J. Moore, Federal Practice ¶7.02 (1985 ed.) 9

3 J. Moore, Federal Practice ¶15.07[1] (1985 ed) 9

3 J. Moore, Federal Practice ¶15.07[2] (1985 ed.) 9

3 J. Moore, Federal Practice ¶15.13 (1985 ed.) 13

3 J. Moore, Federal Practice ¶15.14 (1985 ed) 13

3 J. Moore, Federal Practice ¶16.06 (1985 ed.) 9

3 J. Moore, Federal Practice ¶16.09 (1985 ed.) 12

4 J. Moore, Federal Practice ¶26.64[1] (1984 ed.) 17

4 J. Moore, Federal Practice ¶26.64[3-2] (1984 ed.) 17

H. J. Stern, Winning Trial Advocacy and Techniques (1986) 14, 15

5 C. Wright & A. Miller, Federal Practice and Procedure § 1183 (1969 ed.) 9

6 C. Wright & A. Miller, Federal Practice and Procedure § 1475 (1971 ed.) 9

6 C. Wright & A. Miller, Federal Practice and Procedure § 1491 (1971 ed.) 13

6 C. Wright & A. Miller, Federal Practice and Procedure § 1493 (1971 ed.) 13

6 C. Wright & A. Miller, Federal Practice and Procedure § 1526 (1986 pocket part) (1971 ed.) 10, 12

6 C. Wright & A. Miller, Federal Practice and Procedure § 1527 (1971 ed.) 12

8 C. Wright & A. Miller, Federal Practice and Procedure § 2023 (1970 ed.) 17

8 C. Wright & A. Miller, Federal Practice and Procedure § 2023 (1970 ed.) 17

8 C. Wright & A. Miller, Federal Practice and Procedure § 2026 (1970 ed.) 17

I. Younger, The Art of Cross-Examination (A.B.A. Litigation Monograph Series, 1976) 15

MISCELLANEOUS

Notes of Advisory Committee on Rules for the 1983 Amendment of Fed. R. Civ. P. 16(c) 19

Notes of Advisory Committee on Rules for the 1983 Amendment of Fed. R. Civ. P. 16(e) 10

Notes of Advisory Committee on Rules for the 1970 Amendment of Fed. R. civ. P. 26(b)(3) 18

The petitioner Edward A. Haffer respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the First Circuit, described below.

Opinions Below

The two opinions of the Court of Appeals for the First Circuit are reported as *Action Mfg., Inc. v. Fairhaven Textile Corp. et al.*, 790 F.2d 164 (1st Cir. 1986), and appear in the Appendix (A. 9, 14). The decision of the United States District Court for the District of New Hampshire is not generally reported, but appears in the Appendix (A. 19).

Jurisdiction

The judgment of the Court of Appeals on rehearing was dated and entered on May 14, 1986. The original judgment was dated and entered on February 20, 1986. It is believed that this Court has jurisdiction to review under 28 U.S.C. § 1254(1). If, however, it is determined that the petitioner is not a "party" for purposes of 28 U.S.C. § 1254(1), then he respectfully requests that this be treated as a petition for a common-law writ of certiorari under 28 U.S.C. § 1651(a) and Sup. Ct. R. 26 and 27.4.

Constitutional Provisions, Statutes, and Rules Involved

This case involves the due process clause of the Fifth Amendment; 28 U.S.C. §§ 1927 and 2072; Fed. R. Civ. P. 8(c), 15(a), 15(b), and 16; Local Rule 10(b) (D.C.N.H. 1980); and N.H. Rev. Stat. Ann. 382-A:2-607(3)(a), 2-612(1), and 2-714(1). Being lengthy, these provisions are set forth in the Appendix (A. 1).

Statement of the Case

Pre-Appeal

Counsel (Haffer) represented a defendant (Fairhaven) in an action for breach of a contract for shipments of nylon to the plaintiff

(Action). Action brought suit before the United States District Court for the District of New Hampshire, based on diversity jurisdiction. 28 U.S.C. § 1332. Action was a New Hampshire citizen; Fairhaven was a New Jersey citizen; and the matter in controversy exceeded $10,000. The case arose under Article 2 of N.H. Rev. Stat. Ann. 382-A, New Hampshire's enactment of the Uniform Commercial Code. To recover damages on accepted goods under Article 2, a "buyer must within a reasonable time after he discovers or should have discovered *any* breach notify the seller of breach or be barred from *any* remedy." N.H. Rev. Stat. Ann. 382-A: 2-607(3)(a) (A. 8, emphasis added); see also N.H. Rev. Stat. Ann. 382-A:2-714(1) (A. 8).

Without suggestion by the District Court or any party, the Court of Appeals held that counsel had violated the Federal Rules of Civil Procedure by the manner in which he had raised the issue of timely notice at trial. For appealing the District Court's ruling on the merits of timely notice, counsel was fined and censured under 28 U.S.C. § 1927 (A. 1).

Counsel, obviously, does not ask this Court to decide the merits of the Article 2 issues raised below. However, for the Court to assess his procedural and trial conduct in light of the Federal Rules of Civil Procedure and the work-product doctrine, it is crucial first to understand the position he took on the merits. The case involved *one contract* calling for several shipments; it did *not* involve a series of separate contracts. Action's Complaint itself alleged one contract calling for several shipments (A. 53); and even in the absence of such an allegation, the several shipments would have been deemed to be under one contract by operation of N.H. Rev. Stat. Ann. 382-A:2-612(1) (installment contract) (A. 8) (n.b. Comments 2 and 3 to that section).

As the cases and commentary explain, the policy underlying the requirement of timely notice of breach is to allow the seller to take corrective steps as soon as possible, and thus avert later breaches and accumulation of damages. In light of this policy, the statutory requirement of timely notice meant, in counsel's view, timely notice of the *earliest breach of the contract, i.e.*, the earliest breach

which the buyer discovered or should have discovered. Counsel's further reasoning, based on the same cases and commentary, was that failure to give timely notice of the earliest breach would bar "any" remedy *even if* there had been timely notice on a later breach, viewed in isolation. Thus, he reasoned, the statutes did not permit the buyer to fragment a single contract into its several parts, selecting for remedy those shipments on which he had given timely notice of breach, and waiving remedy for those shipments on which he had given no timely notice.

The Complaint specifically confined the claim of breach to nylon shipped in the summer and fall (collectively, the fall breach). Action based its claim on *fall* returns by Action customers of defective Action products that had been made with Fairhaven nylon. The Complaint alleged, and the Answer admitted, timely notice of the *fall breach of the contract.* No other breach was pleaded.

More than two years later, Action answered an interrogatory by claiming damages from an earlier, *spring breach of the same contract.* Action based this claim on *spring* returns by Action customers of defective Action products that had been made with Fairhaven nylon. No timely notice of the spring breach had been given to Fairhaven—indeed, no notice at all, until Action's response to the interrogatory. Because the spring breach was the *earliest breach of the contract,* and because Action had failed to give timely notice of it, counsel's position was that under the statutes Action should be barred from "any" remedy. Moreover, in light of the spring breach, counsel's admission of timely notice of the fall breach had become immaterial.

Action did not amend its Complaint to refer to the spring breach. Fairhaven, therefore, did not amend its Answer. The Complaint and Answer thus remained confined to the fall breach of the contract.

Action, Fairhaven, and the third-party defendant (Brawer Bros.) filed Pretrial Statements simultaneously, shortly after Action's response to the interrogatory. *All* parties followed the same format: specifying uncontested facts, and then stating that all facts not specified as uncontested were contested. *No* party specified timely notice as uncontested. Thus it was a contested fact for trial. No party

objected to this procedure; all parties relied on it; and the District Court permitted it. The District Court's Final Pretrial Order dealt with the facts by giving a virtually verbatim restatement of Fairhaven's specification of uncontested facts. (A. 85, containing the Pretrial Statements and Order.)

At trial, both Action and Fairhaven put in evidence of the spring breach of the contract. No evidence, however, was offered of notice of the spring breach, since in fact no notice had been given. In closing argument, Fairhaven's counsel contended that Action had failed to prove an element of its case, namely, timely notice of the spring breach, the earliest breach of the contract. Action did not object to his arguments.

The District Court judge, who had entered the Final Pretrial Order and had seen and heard all the evidence and all the arguments, closed the trial saying:

> I'd just like to make one comment before I leave the bench. And I'm sorry Mr. Brawer isn't here.
>
> And that is, that I commented during the trial in chambers to my personnel that this case has been very well tried by all parties. Counsel did a lot of work and it's a very intricate, difficult case to decide, you know that, but you made it a lot easier by the way you presented it and the time you put into it, the exhibits, the way everything went in, and you're to be commended.

In post-trial filings, Action did not object to Fairhaven's Answer or Pretrial Statement or the trial tactics of Fairhaven's counsel. Nor were these matters criticized by the District Court. The Court ruled against Fairhaven on the merits of timely notice, and gave judgment for Action (A. 46, 48).

Appeal — First Opinion

Fairhaven appealed to the Court of Appeals for the First Circuit, making essentially the same argument on notice that it had made below. Action responded to the argument strictly on the merits. It did *not* contend that Fairhaven had admitted notice, either in its Answer or in its Pretrial Statement or in anything

else. A judge of the Court of Appeals, however, raised the question of admission for the first time during oral argument, by questions to Fairhaven's counsel. In his attempts to answer, counsel was repeatedly interrupted (A. 65-67).

In its first opinion (A. 14), written by the questioning judge, the Court of Appeals censured counsel for appealing the issue of timely notice, and required him to pay $2,000 in attorneys' fees, citing 28 U.S.C. § 1927 (A. 16). Counsel had received no prior notice that he would be subject to punishment; the opinion itself was his first notice of charges. It described his conduct as a "conspicuous example of improper advocacy," an "unabashed piece of sharpness," and an "imposition on appellee and the court" (A. 15-16); it called the sanctions "punitive" (A. 18).

In a Verified Petition For Rehearing En Banc (A. 52), counsel gave a detailed exposition of the facts, the law, and his own good faith. Counsel explained his position on burden of proof, nonamendment of Fairhaven's Answer, and trial of issues by the implied consent of all parties (A. 56-58). He explained that the Court had mistakenly read the Answer's limited admission of notice of the fall breach as an unlimited admission, extending also to the previous spring breach (A. 53-61). He also pointed out that Fairhaven's Pretrial Statement had *not* included notice in the specification of uncontested facts, but had included it under contested facts, through the statement, "All other facts are contested" (A. 56).

Appeal — Second Opinion

In the second opinion (A. 9), the original panel, writing per curiam, acknowledged counsel's position that the scope of the pleadings was limited to the fall breach. However, it refused to withdraw the punishment. Instead, it revised its rationale, stating two new grounds. One was procedural, and the other was substantive; both are described in detail in Reasons for Granting the Writ.

Otherwise, the Court neither answered nor revealed counsel's explanation in his Verified Petition. The Court said that counsel's procedural position was "outlawed" (A. 12). It said that his position on the merits was "extraordinary," on its view that, "[t]he spring goods, and the fall goods, were separate orders, and separate shipments" (A. 11). Calling counsel's overall position "[a]t the least . . . frivolous" (A. 12), it let the original opinion and punishment stand. The requests for rehearing and for en banc review were denied (A. 13).

Reasons for Granting the Writ

I. In Requiring that a Defendant's Counsel Automatically Notify the Plaintiff of any Anticipation that the Plaintiff Will Fail to Prove an Element of Its Case, the Court of Appeals Has Contravened Certain Provisions of the Federal Rules of Civil Procedure and the Work-Product Doctrine. The Decision Is In Conflict with the Rules Prescribed by This Court Under 28 U.S.C. § 2072; Is In Conflict with *Hickman v. Taylor*, 329 U.S. 495 (1947); and Presents an Important, Unresolved Question on the Application of the Work-Product Doctrine to Fed. R. Civ. P. 16.

The Court's first opinion was grounded on an overbroad and incorrect reading of the pleadings. The result was the misconception that Fairhaven had admitted timely notice of the spring breach in its Answer, and had then taken a contrary position at trial and on appeal. On that basis, counsel was punished. Although in its second opinion the Court acknowledged that the pleadings were confined to the fall breach, it refused to withdraw the punishment. Instead, it revised its rationale, introducing what it called the "universal principle," which it described as follows:

> As a general principle the presentation of claims beyond the complaint without objection is considered an informal amendment of the complaint. See *Lynch v. Dukakis*, 719 F.2d 504, 508 (1st Cir. 1983); F.R. Civ. P. 15(b). In the absence of notice

> to the contrary it may be assumed that the defendant does not choose to amend its answer. Anything else would be inconsistent with the universal principle that the issues in the case are to be made known in advance.[1] [A. 11.]

As that principle was applied here — absolutely, and without regard to differing rules and competing values — it was unprecedented and unsupportable. Its application translated into a new basis for counsel's punishment: his failure to step forward and notify Action of his anticipation that Action would fail to prove timely notice of a claim "beyond the complaint," *i.e.*, a claim of damages from the spring breach, the earliest breach of the contract.

As is explained in this Argument, no such duty exists under the Federal Rules of Civil Procedure, with which counsel fully complied. In fact, the Court's radical departure from established procedure vitiates the following rules (A. 2-6):

1. Fed. R. Civ. P. 8(c), by requiring that an element of the plaintiff's cause of action be raised by the defendant as if it were an affirmative defense;

2. Fed. R. Civ. P. 15(a), by requiring that the defendant give a particularized answer to an averment of fact that was neither pleaded originally nor pleaded by amendment;

3. Fed. R. Civ. P. 16, by usurping the discretion of the District Court in the management of pretrial proceedings — more spe-

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[1] The "universal principle" is addressed throughout this Argument, but brief comment should be made on the two sentences which precede and introduce it. Setting aside the looseness of the Court's generalizations, neither they nor *Lynch* have any application to the Answer here. As is explained in this Argument, Action did not amend its Complaint under Rule 15(a); and notice was not an affirmative defense under Rule 8(c). Fairhaven therefore had no duty to amend its Answer, which was limited to the fall breach. See *infra* pp. 8-9. Though the Court cites Rule 15(b), it misapplies it. See *infra* pp. 12-14. Likewise, the Court misapplies *Lynch*, which involved an attempt by plaintiffs to add a claim under a different statute from the one pleaded in their Complaint.

cifically, by rejecting pretrial procedures which the District Court had permitted, which all parties had followed, and on which all parties had relied; and

4. Fed. R. Civ. P. 15(b), by permitting the plaintiff to try an unpleaded claim for damages without having to prove an element of that claim.

The Court's "universal principle" also contravenes the work-product doctrine of *Hickman v. Taylor*, 329 U.S. 495 (1947), which shields a lawyer's "mental impressions," "legal theories," and "strategy" from "undue" disclosure. *Id.* at 511. As is explained below, though *Hickman* involved the discovery rules (Rules 26 *et seq.*), its logic permeates the entire adversary system, encompassing every aspect of the lawyer's role before and during the trial. Part of that role, of course, involves Rule 16; and the Court's application of the "universal principle" to that rule brings it into conflict with *Hickman*.

A. *Neither Rule 8(c) nor Rule 15(a) required the defendant to notify the plaintiff of the anticipated failure of proof. These rules are vitiated by the Court's new requirement of automatic notification.*

Rule 8(c) requires a defendant to "set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense" (A. 2).

> Notification under section 2-607 [of Article 2] is an integral part of a *buyer's* cause of action and is *not* an affirmative defense of the *seller*. Therefore, the *buyer* must both plead and prove that the notice requirement has been complied with.

Eastern Airlines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 970 n.31 (5th Cir. 1976) (emphasis added). *Royal Typewriter Co. v. Xerographic Supplies*, 719 F.2d 1092, 1102 (11th Cir. 1983); *K & M Joint Venture v. Smith International, Inc.*, 669 F.2d 1106, 1111 (6th Cir. 1982); *Standard Alliance Ind. v. Black Clawson Co.*, 587

F.2d 813, 823 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979) — all cited by counsel to the Court of Appeals. Since notice under Article 2 is not a matter of affirmative defense, Fairhaven had no duty under Rule 8(c) to step forward and plead it.

Rule 15(a) requires a party to "plead in *response* to an *amended pleading* ... within 10 days after *service* of the *amended pleading*" (A. 2, emphasis added). See 6 C. Wright & A. Miller, Federal Practice and Procedure § 1475, pp. 387-89 (1971 ed.); and 3 J. Moore, Federal Practice ¶¶ 15.07[1] and [2], pp. 15-29 through 15-43 (1985 ed.). Rule 7(a) defines "pleading" to be a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer. An answer to interrogatory, such as the one in which Action claimed damages on the spring breach, is not a "pleading." See 5 C. Wright & A. Miller, *supra*, at § 1183, pp. 13-15 (1969 ed.); and see 2A J. Moore, *supra*, at ¶ 7.02, pp. 7-7 through 7-8 (1985 ed.). Since Action had not amended its Complaint to make a claim for relief on the spring breach or even to refer to that breach, Fairhaven had no duty to amend its Answer, which was specifically confined to the fall breach. See also *infra* p. 13.

See Argument II for the facts on counsel's arguments to the Court of Appeals on burden of proof and nonamendment of Fairhaven's Answer, and the Court's silent rejection of those arguments.

B. *Rule 16, as properly applied by the District Court in its discretion, did not require the defendant to specifically notify the plaintiff of the anticipated failure of proof. This proper application of the rule is vitiated by the Court of Appeals' new requirement of automatic notification. Moreover, through that requirement, the Court of Appeals has usurped the discretion of the District Court in the management of pretrial proceedings.*

"Pretrial procedure is optional with the particular district court, inasmuch as Rule 16 is permissive in terms." 3 J. Moore, *supra*,

at ¶ 16.06, p. 16-27 (1985 ed.). The District Court in this case permitted the pretrial procedure which all parties had followed and on which all parties had relied. See Local Rule 10(b) (D.C.N.H. 1980) (A. 6) and Rule 16 (1938, before the 1983 amendments) (A. 3). The version of Rule 16 then existing — which the Pretrial Statements contemplated — provided for the District Court to make an order "which limits the issues for trial to those *not disposed of by admissions or agreements of counsel.*"[2] (Emphasis added.) Here, notice on the spring breach had clearly *not* been disposed of by any admissions or agreements of counsel. On that basis alone, notice was to be an issue for trial. Furthermore, when in the Pretrial Statements *no* party had included notice in its specification of uncontested facts and *all* parties had made the general statement that all other facts were contested, notice was, unquestionably, contested.[3] If Action did not understand that point, then it did not understand either the elements of its own cause of action, which it had been litigating for almost three years, or the significance of its own Pretrial Statement.[4]

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[2] The Pretrial Statements were submitted by all parties on March 28, 1983. Rule 16 was amended on April 28, 1983 (A. 4), and the amendment took effect on August 1, 1983. The District Court entered its Final Pretrial Order on August 8, 1983. The amendment did not substantially change the part of the original rule dealing with pretrial orders, although it did delete the specific language quoted in the text. See the Notes of Advisory Committee on Rules for the 1983 Amendment of Rule 16(e); and see 6 C. Wright & A. Miller, *supra*, at § 1526, p. 297 (1986 pocketpart) (1971 ed.).

[3] Notice was, moreover, indeed an issue of fact. "Whether proper notice was given is a question of *fact*." *Standard Alliance*, 587 F.2d at 823 (emphasis added). *Royal Typewriter*, 719 F.2d at 1102; *Mariner Water, Etc. v. Aqua Purification, Etc.*, 665 F.2d 1066, 1069 (D.C. Cir. 1981); *Eastern Airlines*, 532 F.2d at 973.

[4] In the section of Fairhaven's Pretrial Statement on "Disputed Issues of Law," Fairhaven said, "*Other than obvious disagreement over whether the evidence supports the various claims*, Fairhaven is not aware of any disputed issues of law" (emphasis added). As already noted, Sections 2-714(1) and 2-607(3)(a) required Action to prove proper notice; without such evidence, Action simply could not support its claim for damages. The point was, literally, elementary — or at least should have been, to a plaintiff that had been litigating a damages claim rooted in Section 2-714(1).

In the briefs to the Court of Appeals, no party argued that there had been any deficiency in the Pretrial Statements (or the Answer).[5] Action did *not* contend that Fairhaven could not appeal notice; *nor* did it contend that Fairhaven had admitted it, either in its Answer or in its Pretrial Statement or in anything else. Rather, Action dealt with notice on the merits.

The first challenge to Fairhaven's Pretrial Statement (and Answer) occurred without forewarning at the start of oral argument by Fairhaven's counsel. In response to questioning by a judge, counsel correctly stated that the Pretrial Statement had not *specifically* raised notice. The judge indicated that notice had to be specified in the Pretrial Statement before it could be contested at trial. He said that "the court looks at a pretrial memorandum. I've sat on the district court off and on for 30 years and I shall continue to do it that same way and so do all district judges" (A. 66). The statement reflects a fundamental confusion between the province of a District Court judge and that of a Court of Appeals judge. See Rules 16 and 83 (A. 3-6). Under Rule 16, the District Court judge here had the power (1) to order all parties to recite specifically which facts they were going to contest, and (2) to preclude them from raising at trial any fact that had not been specifically recited — assuming, however, no violation of *Hickman v. Taylor*.[6] "If the *pretrial judge* decides the pretrial

[5] Fairhaven's brief cited the Court to statutes, commentary, and cases in support of its contentions on notice (A. 68-76). The first case it cited was *Standard Alliance*, 587 F.2d 813, which in addition to holding "[w]hether proper notice was given is a question of fact" (at 823), also holds, "*If the evidence is clear*, however, a court can rule as a matter of law that a party failed to give proper notice." *Id.* (emphasis added). *Cf. Celotex Corp. v. Catrett*, 54 U.S.L.W. 4775, 4777 (1986) (applying the same principle in the context of Rule 56). Arguing that the evidence here was indeed clear, Fairhaven asked the Court to rule as a matter of law that Action had failed to give proper notice.

[6] Though any such order would have to be obeyed (see Rule 16(f), authorizing the District Court to impose sanctions), an objection could be taken to the extent the order infringed interests protected under *Hickman v. Taylor*. Here, however, the District Court did *not* enter such an order. The pretrial procedure actually employed — again, without objection — therefore raised no issue whatever under *Hickman v. Taylor*.

memorandum [filed by any party] is not sufficiently informative he may require a new statement to be filed." 6 C. Wright & A. Miller, *supra*, at § 1527, p. 614 (emphasis added). Here, however, the pretrial judge (who was also the trial judge) made no such order.

Moreover, Fairhaven reasonably relied on the procedure that had been actually permitted — as did the other two parties, who had proceeded exactly as Fairhaven had. Though the Court of Appeals judge has evidently required a different procedure in his sittings as a District Court judge, his is not the universal way. "The district courts have adopted a variety of local rules, standardized forms, and practices with regard to pretrial procedures, reflecting continuing differences of view as to the purposes of pretrial and the optimum conditions for its use. Generalization about procedures is therefore hazardous." 3 J. Moore, *supra*, at ¶ 16.09, p. 16-32 (1985 ed.). See also Rule 83. Furthermore, at no point — not even on appeal — did any party, including Action, object either to the pretrial procedure employed in this case or to any pretrial statement submitted. There was, therefore, absolutely no pretrial issue before the Court of Appeals. By raising the issue on its own motion, moreover, the Court overlooked the principle that "the best way to insure an effective pretrial conference system is to keep appellate interference to a minimum." 6 C. Wright & A. Miller, *supra*, at § 1526, p. 599 (1971 ed.).

See Argument II for the facts on counsel's arguments to the Court of Appeals on Fairhaven's Pretrial Statement, and the Court's silent rejection of those arguments.

C. *Neither Rule 15(b) nor principles of orthodox trial practice required the defendant to notify the plaintiff of the anticipated failure of proof. This rule and these principles are vitiated by the Court's new requirement of automatic notification.*

Rule 15(b) provides, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be

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However, through the usurpation of the District Court's role under Rule 16, the Court of Appeals has created a conflict between Rule 16 and *Hickman v. Taylor*. See *infra* p. 19.

treated in all respects as if they had been raised in the pleadings" (A. 2). Given Action's answer to interrogatory, Fairhaven's counsel expected that at trial Action would offer evidence of damages from the spring breach. Under Rule 15(b), he intended to consent to the trial of that breach. He believed that trial on spring-breach damages would, *ipso facto*, mean trial on spring-breach notice — notice which he had not admitted, and which he knew Action could not prove. The correctness of his belief is confirmed by a review of the elements of the root statute for Action's claim for damages, Section 2-714(1) (A. 8), and also the elements of its companion statute, Section 2-607(3)(a) (A. 8). As already noted, the statutes connect notice and remedy inextricably; they make the one intrinsic to the other: a buyer may have no remedy unless it proves proper notice. It was, therefore, unthinkable that Rule 15(b) consent would be applied in such a way as to amputate notice from remedy, *i.e.*, to let Action claim spring-breach damages without having to prove the contested fact of spring-breach notice.[7] Counsel has since searched for and found no case allowing such an escape from burden of proof. See generally 3 J. Moore, *supra*, at ¶¶ 15.13 and 15.14, pp. 15-118 through 15-139 (1985 ed.) and the cases there collected; and 6 C. Wright & A. Miller, *supra*, at §§ 1491, 1493, pp. 453-56, 460-74 (1971 ed.) and the cases there collected. See also Rule 1 (requiring that the rules be construed to secure "just" determinations). Cf. *Brandon v. Holt*, 469 U.S. 464 (1985).

By the context in which the Court cites Rule 15(b) (see *supra* pp. 6-7), it suggests that, although the plaintiff is free to present claims "beyond the complaint," the defendant has a duty to "amend its answer" in anticipation of trial of those claims. Rule 15(b), however, imposes no such duty, let alone a duty to do so before trial. The rule provides:

> Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these

[7] Given the spring returns and the spring credits (described *infra* p. 14), counsel believed that at the very least Action "should have discovered" the spring breach. See N.H. Rev. Stat. Ann. 382-A:2-607(3)(a) and 2-714(1) (A. 8).

> [unpleaded] issues may be made upon motion of any party at any time, *even after judgment*; but failure to so amend does *not* affect the result of the trial of these issues. [A. 2, emphasis added.]

When at trial Action offered into evidence a business record of spring credits to Action customers who had returned defective products made with Fairhaven material, Fairhaven did not object. It thereby consented under Rule 15(b) to try Action's unpleaded claim. Fairhaven's counsel cross-examined Action's president on the business record, and on Action's answer to interrogatory claiming damages on the spring breach. All this was done without objection.

Consistent with orthodox trial practice, counsel did not, however, inquire about notice on the spring breach. He knew that in fact there had been none, as Action itself would concede on appeal. He also had two other points in mind: (1) notice was a fact on which Action, not Fairhaven, had the burden of proof; and (2) he feared eliciting false evidence. The fear was genuine and substantial. Another exhibit admitted into evidence was a 1979 Report of the Master of the Suffolk County (Mass.) Superior Court in a suit brought against Action's president by his former employer. The Master found among other things that the president had: (1) *caused a false invoice to be placed in evidence, unbeknownst to his counsel*; (2) directed the payment of bribes or kickbacks; (3) lied to his former employer; (4) given completely incredible testimony; and (5) committed at least thirteen separate breaches of fiduciary duty.

Fairhaven's counsel had a duty to his own client to cross-examine this dangerous witness with care. In inquiring about the spring damages without referring to notice, counsel followed trial techniques advocated in 3 I. Goldstein & F. Lane, Trial Techniques ch. 19 (2d ed. 1969). The Goldstein treatise has been called "a classic." H. J. Stern, Winning Trial Advocacy and Techniques, p. 66 (1986). Counsel adhered to the following "cardinal principles of cross-examination" urged in Goldstein: "Keep your objective hidden"; "Avoid too broad cross-examination"; "Leave well enough alone"; "Closing argument may be [the] most important part of cross-examination." See 3 I. Goldstein & F. Lane, *supra*, at §§

19.17-19.20, pp. 25-29. These principles are repeated throughout the literature on trial technique. See, e.g., I. Younger, The Art of Cross-Examination (A.B.A. Litigation Monograph Series, 1976) ("Disallow witness explanation"; "Limit questioning"; "Save for summation," pp. 28-32); and J. L. Kestler, Questioning Techniques and Tactics (1982) ("Know when to quit"; "Do not telegraph the punch," pp. 29-31). To have ignored these rules with any witness would have been imprudent. To have ignored them with the witness here, given his history, could have amounted to malpractice. Though the Court of Appeals was to excoriate counsel for not specifically mentioning notice until closing, he followed the rules and discharged his duties. He should not as a consequence have been punished. As Judge Stern says:

> [D]on't attack the lawyers for doing what the rules allow. If you don't like the rules, change them. But until you do, a lawyer has an absolute duty to do everything for the client that is permitted to be done — and no one has the right to try to frighten the lawyer into giving anything less.

H. J. Stern, *supra*, at p. 21 (1986).

Counsel saved his point on notice for summation. He argued that under Section 2-607(3)(a), "Action is barred from any remedy, because it did not give notice as it had to within a reasonable time after it discovered or should have discovered there was a problem with Fairhaven's goods." He pointed out that "no notice was sent to Fairhaven until sometime after September 17," even though June "was when [Action] customers started returning the defective products" and started receiving the Action credits. Action's counsel neither objected to the argument nor requested a continuance. See Rule 15(b); see also, e.g., *George Cohen Sons & Company v. Koch*, 376 F.2d 629, 632-33 (1st Cir. 1967).

In Fairhaven's post-trial filings, it asked the Court to find as a matter of fact that Action had given no notice on the spring breach, and to rule as a matter of law that under Section 2-607(3)(a) Action's failure barred "any" remedy. In Action's post-trial filing, it expressly requested damages not only on the fall

breach, but also on the spring breach. Action made no objection to Fairhaven's Answer, Pretrial Statement, or trial tactics. The District Court, in rejecting Fairhaven's contentions on the merits, did not criticize Fairhaven's Answer, Pretrial Statement, or trial tactics. In fact, as noted previously, the Court had closed the trial commending all counsel for their conduct.

See Argument II for the facts on counsel's arguments to the Court of Appeals on trial by implied consent, and the Court of Appeals' silent rejection of those arguments.

D. *The Court's new requirement of automatic notification contravenes the work-product doctrine of Hickman v. Taylor, and brings Rule 16 into conflict with that doctrine.*

This Court in *Hickman* recognized the high place of notice in the pretrial process. However, it also recognized the existence of competing values and the resulting need to balance. Referring not only to the discovery rules, but also to Rule 16, it said: "[C]ivil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." 329 U.S. at 501. The Court's very articulation of the notice principle, however, acknowledges that it is not absolute. Moreover, referring on the one hand to "unwarranted excursions into the privacy of a man's work," and on the other to the "public policy support[ing] reasonable and necessary inquiries," the Court concluded: "Properly to balance these competing interests is a delicate and difficult task." 329 U.S. at 497.

Under *Hickman*, a lawyer may

> prepare his *legal theories* and plan his *strategy* without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in . . . *mental impressions, personal beliefs,* and *countless other*

> tangible and *intangible ways* — aptly though roughly termed . . . the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand [or, here, by automatic notification], much of what is now put down in writing would remain unwritten. *An attorney's thoughts, heretofore inviolate, would not be his own.* Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. 511 (emphasis added).

The work-product doctrine is now reflected in part in Rule 26(b)(3). That rule permits discovery of documents and tangible things prepared in anticipation of litigation, but only upon a showing of substantial need and undue hardship. When the court is satisfied that such a showing has been made, it nevertheless "*shall* protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney . . ." (emphasis added). See generally 4 J. Moore, *supra*, at ¶ 26.64[1], pp. 26-348 through 26-351; ¶ 26.64 [3-2], pp. 26-382 through 26-389 (1984 ed.); and 8 C. Wright & A. Miller, *supra*, at § 2023, pp. 190-96; § 2026, pp. 229-32 (1970 ed.).

The Court of Appeals' new doctrine obliterates the public policy originally announced in *Hickman* and now reflected in part in Rule 26(b)(3). First, it requires automatic notification of any anticipation of an opponent's failure of proof, even in the absence of any request for information by the opponent. Second, it requires such automatic notification even in the absence of any showing of substantial need or undue hardship. That showing, significantly, could never have been made here, since: (a) the fact of the spring damages had always been known by Action; (b) it was Fairhaven, not Action, that needed discovery to learn of that fact; and (c) the fact bore on a legal point that was, literally, elementary — the statutory requirement that a buyer prove timely notice in its claim for damages. Finally, the automatic-notification rule requires the very disclosure of which *Hickman* disapproves, and against which

Rule 26(b)(3) commands protection, *i.e.*, "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney."[8] See *F.T.C. v. Grolier, Inc.*, 462 U.S. 19 (1983); *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981); and *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975) (in which the Fourth Circuit construed the rule as conferring "absolute immunity" (at 734) on an attorney's mental impressions).

Unlike Rule 26(b)(3), *Hickman* does not confine its protection to the mental impressions of a lawyer that are reflected in documents and tangible things. Though it is true that *Hickman* did involve the discovery rules (Rules 26 *et seq.*), its logic has wider application. Significantly, the Court in *Hickman* specifically likened the discovery rules to Rule 16. 329 U.S. at 501. Even more generally and fundamentally, however, *Hickman* applies to the adversary system itself, in its entirety. Mr. Justice Jackson made the point explicit in his concurring opinion: "[T]rial is and always should be an adversary proceeding. [The Federal Rules of Civil Procedure] were hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." 329 U.S. at 516. See *Duplan*, 509 F.2d at 734.

This case demonstrates a need to say what should be obvious: the adversary system of jurisprudence imposes a duty on counsel to *be* an adversary. He breaches that duty if, without lawful compulsion and contrary to his own client's interests, he aids and teaches his adversary. Such gratuitous instruction could be malpractice. Though the Court of Appeals now compels that result through the "universal principle," the compulsion is unlawful. It is unlawful because it is a usurpation of the province of this Court to

[8] The Notes of Advisory Committee on Rules for the 1970 Amendment of Rule 26(b)(3) indicate that under Rules 33 (interrogatories) and 36 (requests for admissions), "a party and his attorney . . . *may* be required to disclose, *to some extent*, mental impressions, opinions, or conclusions" (emphasis added). But see *Duplan*, 509 F.2d 730 (cited in full, above, in the text).

prescribe the rules of civil procedure. 28 U.S.C. § 2072 (A. 1). What this Court said in *Miner v. Atlass*, 363 U.S. 641, 649-50 (1960), in the context of rejecting certain local admiralty rules, applies with no less force to the Court of Appeals' automatic-notification rule:

> [T]he matter is one which, though concededly "procedural," may be of as great importance to litigants as many a "substantive" doctrine, and which arises in a field of federal jurisdiction where nationwide uniformity has traditionally always been highly esteemed.
>
> The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court, . . . designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters with all the opportunities for comprehensive and integrated treatment which such consideration affords.

Application of the Court's automatic-notification requirement to Rule 16 brings that rule into conflict with *Hickman*: when any counsel on filing a pretrial statement anticipates that an opponent will fail to prove an element of its case, counsel will be automatically required to say so. It makes no sense, however, to protect a lawyer's mental impressions and strategy in the context of discovery and then to require their revelation in the context of pretrial proceedings. Though the Court neither cited Rule 16 itself nor the Notes on the Advisory Committee on Rules for the 1983 Amendment of Rule 16, it in essence misapplied the following statement of the Committee concerning Rule 16(c): "Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue for the court, the right to have the issue tried is waived." It cannot be presumed, however, that the Advisory Committee intended its statement to be applied in derogation of the balancing requirement laid down in *Hickman*. Nothing in Rule 16 itself suggests such a result. Nothing in the rule suggests that a defendant's counsel may be forced into a position where he either (1) must

waive an issue which he does not have the burden to prove, or (2) must divulge his mental impressions and strategy concerning the plaintiff's prospective failure of proof. Any obligation to identify an issue should be on the party who has the burden to prove it. Alternatively, the balance between notice and protection of work product may be struck as it was actually struck here: where the District Court permitted the parties to specify uncontested facts, and then state that all other facts were contested. See *supra* pp. 3 and 10.

Finally, when the Court in *Hickman* likened Rule 16 to the discovery rules (329 U.S. at 501), it strongly signalled that the following statement should also apply to Rule 16:

> When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and *mental processes* of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.[9]

329 U.S. at 514 (emphasis added).

II. When Counsel's Conduct Fully Complied with the Federal Rules of Civil Procedure and was Otherwise Well Grounded in Fact and Law, the Court of Appeals Exceeded its Authority Under 28 U.S.C. § 1927 in Punishing Him for not Anticipating its Automatic-Notification Rule. The Decision Constitutes a Grave Miscarriage of Justice, Calling for Guidelines that Protect Against the Punishment of Responsible Advocacy, and Calling Also for an Exercise of This Court's Power of Supervision.

In its first opinion, the Court of Appeals based its punishment of counsel on the misconception that his position at trial and on ap-

[9] Counsel did not specifically mention the words "work-product doctrine" in his Verified Petition, since he had not anticipated the Court's revision in rationale, which has brought that doctrine to the fore. He did, however, raise the essence of work product, telling the Court, "having no duty to school Action on the implications of *its* damages claims or *its* burden of proof, he honored his duty, completely within the law and in conflict with no other, to protect his *own* client . . ." (A. 61, emphasis in original).

peal was contrary to his position in the Answer. That misconception was the result of the Court's failure to note that the Complaint and Answer had been specifically confined to the fall breach only. The mistake was explained in detail in counsel's Verified Petition (A. 53-61).

In its second opinion, unlike its first, the Court acknowledged that the pleadings were confined to the fall breach, and that Action had expanded its claim for damages to include the unpleaded spring breach:

> The complaint sought damages for allegedly defective materials furnished in the early fall of 1979. Prior to the pretrial plaintiff expanded its damage claim to include a small amount of goods supplied the preceding spring. [A. 10.]

These critical points had been the focus of Fairhaven's two-page reply brief to the Court of Appeals, filed four months before oral argument (A. 83). Despite the Court's acknowledgment of the points in its second opinion, it refused to withdraw the punishment.

The Court said in its second opinion: "At the very least, and we cannot emphasize this too highly, if notice was considered *no longer admitted* as to the *fall* goods, this would be in *flat contradiction* to an answer which stood unamended" (A. 11, emphasis added). The Court's hypothesis is false; so, therefore, is its conclusion. Contrast what counsel actually said in his Verified Petition:

> . . . To repeat, so that there is absolutely no mistake about it: Fairhaven admitted and continues to admit that as a matter of *fact* it received timely notice on the *September* [fall] items; however, as a matter of *law* under Section 2-607(3)(a), the timely notice on these items became immaterial when it was later revealed that there had been a failure of notice on the *June* [spring] items. Again, see pages 4-14 of Fairhaven's original brief. [A. 58, emphasis in original.]

Cf. *Celotex Corp. v. Catrett*, 54 U.S.L.W. 4775, 4777 (1986) (in the context of discussing Rule 56: "a complete failure of proof concerning an essential element of the . . . party's case necessarily renders all other facts immaterial.")

The Court said that counsel's position on the merits was "[a]t the least . . . frivolous" (A. 12). It also said the following, starting with a quotation out of context from counsel's Verified Petition:

> "[D]espite the timely notice on the *September* items, Action would be barred from *any* remedy," (viz., for the fall items, as well as the spring's). (Emphasis in orig.) As a legal proposition, for which incidentally, defendant cites *no authority*, this seems an *extraordinary position*. The spring goods, and the fall goods, were separate orders, and separate shipments. [A. 11, emphasis on "no authority" and "extraordinary position" added in this Petition.]

The statement that counsel cited "no authority" is patently incorrect. *He cited authority in the very sentence which the Court quotes out of context.* Not once, but twice, counsel said the following in his Verified Petition:

> . . . *By operation of Section 2-607(3)(a),* despite the timely notice on the *September* items, Action would be barred from *any* remedy, because it had not given timely notice on the earlier, *June* items. The rationale is that if Action had given timely notice on the June items — whether or not it later claimed damages on them — Fairhaven could have then taken steps to avert any later problem. See pages 4-14 of Fairhaven's original brief. [A. 56 and 58, emphasis in original on "September," "any," and "June"; emphasis on opening clause added in this Petition.]

Nine times in the Verified Petition counsel cited Section 2-607(3)(a) (A. 53-59). Moreover, pages 4-14 of Fairhaven's original brief, to which the Court was referred three times, is replete with authority for counsel's legal position (A 68-76). The brief not only cites, but quotes, Sections 2-607(3)(a) and 2-714(1) and other pertinent sections of the Code. It also quotes extensively from commentary by Uniform Commissioners and from case law. Yet in the face of all that, the Court said, incredibly, that counsel

had cited "no authority" and that his position was "extraordinary" and "[a]t the least . . . frivolous." It did so, moreover, without even *citing*, let alone discussing, *any* statute, *any* commentary, or *any* case whatsoever on the merits. Repeating a glaring omission from the first opinion, it did not even identify Article 2 of the Uniform Commercial Code as the governing substantive law.

The court based its conclusion that counsel's position was "extraordinary" on its observation that "[t]he spring goods, and the fall goods, were separate orders, and separate shipments." This observation, though accurate, is beside the point. The point is not whether timely notice had been given of breach of a particular *shipment*, viewed in isolation. The point, rather, is whether timely notice had been given of breach of the overall single *contract*, which called for several shipments. See Section 2-612(1)(n.b. Comments 2 and 3).

What matters here, however, is not whether one thinks the preceding substantive contentions of counsel are correct (even though counsel is convinced they are). What matters here is that they are neither "extraordinary" nor "[a]t the least . . . frivolous." Nor are they unreasonable or vexatious. 28 U.S.C. § 1927.[10] They are, rather, based on fact and law and made in good faith. To punish counsel for urging them is egregious. See *Thompson v. City of Louisville*, 362 U.S. 199 (1960); and contrast *Talamini v. All-State Insurance Co.*, 105 S. Ct. 1824 (1985).

The Court's analysis was incorrect not only factually and substantively, but also procedurally. See Argument I. In his Verified Petition, counsel reminded the Court that it was Action, not Fairhaven, which had the burden of proof on notice (A. 57). To support his point, he quoted the same passage from *Eastern Airlines* that appears *supra* at p. 8, and cited the same cases that also appear *supra* at p. 8 (all but one of which had been cited in his original brief) (A. 73-76). See Rule 8(c). Counsel also reminded the Court that it was Action, not Fairhaven, which had taken the case

[10] In its first opinion, the Court based the punishment exclusively on 28 U.S.C. § 1927. In its second opinion, the Court referred to the statute and also to Fed. R. App. P. 38 in citing punishment cases.

outside the pleadings, by adding the unpleaded claim for spring damages (A. 57). See Rule 15(a). Nevertheless, in its second opinion, the Court continued to say nothing about either Rule 8(c) or Rule 15(a). It continued to ignore the fact that Fairhaven had no duty under Rule 8(c) to raise notice as an affirmative defense, nor any duty under Rule 15(a) to amend its Answer.

Also, the Court continued to ignore the permitted practice reflected in the Pretrial Statements of all parties — despite counsel's having stressed that practice in his Verified Petition. Instead, the Court said that the "pretrial statement of disputed issues made no reference to notice" (A. 10). This was misleading. See *supra* pp. 3 and 10. The Court's refusal even to acknowledge counsel's point means that it has outlawed *sub silentio* a pretrial practice which all parties had followed and which the District Court had permitted. The Court of Appeals has made that practice punishable without even explaining to the bar or the District Courts within its circuit just what the practice is. Worst of all, the Court of Appeals has, *ex post facto*, already punished Fairhaven's counsel for following that practice. It has done exactly what Judge Stern speaks against, which bears repeating:

> [D]on't attack the lawyers for doing what the rules allow. If you don't like the rules, change them. But until you do, a lawyer has an absolute duty to do everything for the client that is permitted to be done — and no one has the right to try to frighten the lawyer into giving anything less.

H.J. Stern, *supra*, at p. 21 (1986).

In his Verified Petition, counsel quoted Rule 15(b) at length (A. 57); attached the exhibit which Action had introduced on the spring damages; attached the transcript of part of the cross-examination on the spring damages; and quoted at length the pertinent part of his closing argument at trial (A. 59). All of this, however, was ignored in the Court's second opinion. Though the Court briefly cited Rule 15(b), it did not apply it to the facts. See *supra* p. 13. No authority—neither Rule 15(b) nor anything else —

supports the Court's position that a plaintiff may simultaneously increase its claim for damages while escaping its burden of proof on a contested fact.

The Court similarly ignored another explanation in counsel's Verified Petition. During oral argument, in the context of discussing why the Pretrial Statement had not specifically referred to notice, counsel had begun an explanation saying, "we had a reason for not tipping our hand; one, we —" (A. 67). Counsel was immediately interrupted, and the explanation was never completed. In its first opinion, the Court quoted the statement incompletely, and out of context (A. 16). In his Verified Petition, counsel finished his explanation:

> Fairhaven's reason for not "tipping its hand" to Action — *i.e.*, not specifically telling Action that its own answer to interrogatory on damages had made notice an issue — was part legal and part factual. The legal part was that it had no duty to do so. See pages 6-7 of this Petition [discussing the Pretrial Statement and burden of proof]. The factual part was distrust. Obviously, if there had been a legal duty, distrust would have been no excuse for nonperformance. Here, however, no duty existed: Action, not Fairhaven, had injected the notice issue into the case by claiming damages on the June items, of which Fairhaven had had no prior knowledge; Action, not Fairhaven, had the burden of proof on this injected issue; and Fairhaven had joined the issue by the "Contested Facts" statement of its Pretrial Statement — itself a complete tip of the hand to an opponent that understood its own burden of proof. Though the distrust had many elements (see Fairhaven's original and reply briefs), the heart of it was that Action's president had submitted false evidence in prior litigation. Put in evidence at trial was a 1979 Report of the Master of the Suffolk County (Mass.) Superior Court in an action brought against the president by his former employer (A. __ at 373-448; T.3 at 90-95). The Master found among other things that the president had: (1) *caused a false invoice to be placed in evidence, unbeknownst to his counsel*; (2) directed the payment of bribes or kickbacks; (3) lied to his former employer; (4) given completely incredible testimony; and (5) committed at least thirteen separate breaches of fiduciary

> duty. Fairhaven's counsel feared falsification again; and having no duty to school Action on the implications of *its* damages claims or *its* burden of proof, he honored his duty, completely within the law and in conflict with no other, to protect his *own* client against an opponent with such a past. [A. 60-61, emphasis in original.]

Despite having that full explanation before writing the second opinion, the Court did not disclose it. Rather, it said:

> *In light of the pleadings, and the pretrial silence, it was difficult to think how defendant's counsel could have thought his position with respect to the September goods so obvious that plaintiff's counsel were on actual, as distinguished from possible legal, notice that notice as to these goods was now an issue.* We accordingly inquired as to this during oral argument, and counsel conceded they maintained silence to avoid tipping their hand, in the hope that plaintiff would not try to "fool" them, viz., by offering (false) evidence to meet it. In *other words*, counsel was hoping to fool the plaintiff. This method of trying cases has been *outlawed* in the federal court by the Rules of Civil Procedure since 1940. [A. 11-12, emphasis added.]

The "other words" are the Court's. They are the words of the questioning judge from oral argument (A. 67). They are used unfairly to support a charge that is false, a charge that counsel had engaged in "outlawed" conduct. Counsel's own words, based on fact and showing good faith and lawful conduct, were never revealed.

Three points may be made on the opening sentence of the Court's paragraph. First, as has already been shown, notice on the fall (September) goods was *not* an issue; notice on the earlier, spring goods was. Cf. *Celotex*, 54 U.S.L.W. 4775. This point was made repeatedly in the Verified Petition. Second, as of the time of trial, Action had been litigating its claim for more than three years, a claim rooted in Section 2-714(1), and thus Section 2-607(3)(a). If Action had paid attention to the simple statutory elements of its own claim, then the legal position of Fairhaven's counsel on timely notice of the earliest breach of the contract could only have been "obvious" — "[i]n light of" the actual

pleadings, the actual Pretrial Statements, the actual operation of the Federal Rules of Civil Procedure, the actual facts that Action itself raised during discovery, the actual evidence that Action itself put in at trial, and the actual governing substantive law, which the Court of Appeals never even cited, let alone discussed. Third, this method of trying cases has not been "outlawed . . . by the Rules of Civil Procedure." This method of trying cases complies with those rules. Further, it complies with even deeper principles of jurisprudence: "[T]rial is and always should be an adversary proceeding. [The Federal Rules of Civil Procedure] were hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Hickman*, 329 U.S. at 516 (Jackson, J., concurring).

The final error of the Court of Appeals was of constitutional dimensions. The Court punished counsel for conduct that complied with the established rules, and for advocacy that had express support in the governing substantive law. It did so, moreover, without prior notice of the charges against him, and without any hearing on the charges, either before or after the imposition of punishment. The opinion imposing the punishment was itself counsel's first notice of charges. It required him to pay $2,000 in attorneys' fees and subjected him to unwarranted public humilation. 28 U.S.C. § 1927. This was a violation of due process. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Thompson*, 362 U.S. at 206 ("Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161-74 (1951) (Frankfurter, J., concurring). Had the Court honored counsel's right to due process, its misconceptions could have been corrected before it publicly committed itself to acting on them. Cf. *Aetna Life Insurance Co. v. Lavoie*, 54 U.S.L.W. 4381 (1986).

This case presents a grave miscarriage of justice. It demonstrates a genuine need for guidelines that protect against the punishment of responsible advocacy, having in mind not only the underlying

competing values of judicial efficiency and freedom of access to the courts (see *Talamini*, 105 S. Ct. 1824), but also the possibility of judicial mistake. The severe punishment imposed on counsel was totally unjustified. The wrong is only deepened, moreover, by profound limits on redress. Judicial immunity precludes collateral redress. Absence of automatic reviewability may preclude direct redress. Unless this Court grants review, the Court of Appeals will have acted as sole complainant, sole fact-finder, sole judge, and sole appellate reviewer. The Court of Appeals has been, throughout, demonstrably and terribly mistaken. Counsel respectfully draws this Court's attention to the words of Judge Learned Hand:

> "I beseech ye in the bowels of Christ, think that ye may be mistaken." I should like to have that written over the portals of every church, every school, and every court house, and, may I say, of every legislative body in the United States. I should like to have every court begin, "I beseech ye in the bowels of Christ, think that we may be mistaken."

L. Hand, The Spirit of Liberty, Papers and Addresses of Learned Hand, pp. 229-30 (I.Dilliard coll. 1952).

Conclusion

For the foregoing reasons, we respectfully submit that a writ of certiorari should issue to review the judgments and opinions of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

Stephen E. Weyl, *Counsel of Record*
Edward A. Haffer
Marilyn L. Butler
Sheehan, Phinney, Bass & Green,
Prof. Ass'n
1000 Elm Street
P.O. Box 3701
Manchester, New Hampshire 03105
(603) 668-0300
Counsel for Petitioner

86 No. 198

Supreme Court, U.S.
FILED
AUG 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD A. HAFFER,
PETITIONER

v.

ACTION MANUFACTURING, INC.,
FAIRHAVEN TEXTILE CORPORATION,
AND BRAWER BROS., INC.,
RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STEPHEN E. WEYL, *Counsel of Record*
EDWARD A. HAFFER
MARILYN L. BUTLER
SHEEHAN, PHINNEY, BASS & GREEN,
PROFESSIONAL ASSOCIATION
1000 Elm St., P.O. Box 3701
Manchester, New Hampshire 03105
(603) 668-0300
Counsel for Petitioner

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

Table of Contents

Constitution of the United States, Due Process Clause of the Fifth Amendment 1

28 U.S.C. § 1927 1

28 U.S.C. § 2072 1

Fed. R. Civ. P. 8(c) 2

Fed. R. Civ. P. 15(a) and (b) 2

Fed. R. Civ. P. 16 (1938) 3

Fed. R. Civ. P. 16 (1983) 4

Fed. R. Civ. P. 83 (1938) 6

Local Rule 10(b) (D.C.N.H. 1980) 6

N.H. Rev. Stat. Ann. 382-A:2-607(3)(a) 8

N.H. Rev. Stat. Ann. 382-A:2-612(a) 8

N.H. Rev. Stat. Ann. 382-A:2-714(a) 8

Second Opinion of the Court of Appeals for the First Circuit (May 14, 1986) 13

Order of the Court of Appeals for the First Circuit (May 14, 1986) 14

First Opinion of the Court of Appeals for the First Circuit (February 20, 1986) 19

Opinion of the United States District Court for the District of New Hampshire (September 29, 1986) 64

Verified Petition for Rehearing En Banc (March 4, 1986) 52

Portion of Oral Argument as Transcribed by the Court of Appeals for the First Circuit 64

Pages 4-14 of Brief of Fairhaven Textile Corporation to the Court of Appeals for the First Circuit (April 8, 1985) 68

Pages 8-14 of Brief of Action Manufacturing, Inc. to the Court of Appeals for the First Circuit (April 26, 1985) 77

Reply Brief of Fairhaven Textile Corporation to the Court of Appeals for the First Circuit (May 7, 1985) 83

Fairhaven Pretrial Statement 85
Action Pretrial Statement 88
Brawer Bros. Pretrial Statement 93
Final Pretrial Order 97

Constitution of the United States, Fifth Amendment

No person shall be . . . deprived of life, liberty, or property, without due process of law.

28 U.S.C. § 1927. Counsel's liability for excessive costs.

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

§ 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Fed. R. Civ. P. 8. General Rules of Pleading.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Fed. R. Civ. P. 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the

trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Fed. R. Civ. P. 16 (1938). Pre-Trial Procedure; Formulating Issues.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Fed. R. Civ. P. 16 (1983). Pretrial Conferences; Scheduling; Management.

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;
(2) establishing early and continuing control so that the case will not be protracted because of lack of management;
(3) discouraging wasteful pretrial activities;
(4) improving the quality of the trial through more thorough preparation; and
(5) facilitating the settlement of the case.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;
(2) to file and hear motions; and
(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and
(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) Subjects to be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order

shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 83 (1938). Rules by District Courts.

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Local Rule 10 (D.C.N.H. 1980). Pretrial Procedure.

(b) FINAL PRETRIAL CONFERENCE

A final pretrial conference with the court shall be held at least seven days and not more than twenty-one days prior to trial. This conference will be devoted to frank discussion of any problem that may arise during the trial. Counsel should also be prepared to discuss settlement.

The following material shall be filed not later than fifteen days after close of discovery:

(1) A complete written stipulation as to all uncontested facts.

(2) A complete written stipulation as to pertinent applicable law.

(3) A complete written stipulation of contested issues of fact or, if counsel cannot agree, a separate statement of same by each party.

(4) A complete written stipulation of disputed issues of law or, if counsel cannot agree, a separate statement of same by each party.

(5) A written list of the names and addresses of all witnesses who may be called by each party.

(6) A list of all depositions to be read, or likely to be read, into evidence.

(7) A list of all exhibits to be offered in the direct case of each party, including a brief statement of the reason for the offer.

Counsel are required to bring all exhibits, or exact copies of them, to the Clerk's office on the day of the final pretrial so that they can be examined by all counsel. Counsel will be required to file prior to trial a written statement setting forth the objections, including the grounds thereof, to the exhibits being offered. Failure to file a written objection to an exhibit will be construed as a waiver of objection to such exhibit.

(8) An itemized statement of special damages.

(9) A statement of plaintiff's latest demand and defendant's latest offer.

(10) Request for view, and designation as to who shall pay the cost in the first instance.

(11) A written waiver of claims or defenses, if any.

(12) An estimate of the length of trial.

Continuances will not be granted because of the inability of any witness to be present at the trial. If there is any doubt as to the availability of a witness, then his deposition shall be taken prior to trial. No special permission is required for video tape depositions.

Requests for Instructions, Findings and Rulings shall be filed at the start of trial. Additional Requests may be filed at the close of the evidence.

N.H. Rev. Stat. Ann. 382-A: 2-607 Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy. . . .

N.H. Rev. Stat. Ann. 382-A: 2-612 "Installment Contract"; Breach.

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

N.H. Rev. Stat. Ann. 382-A: 2-714 Buyer's Damages for Breach in Regard to Accepted Goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1429 ACTION MANUFACTURING, INC.,
Plaintiff, Appellee,

v.

FAIRHAVEN TEXTILE CORPORATION,
Defendant, Appellant.

No. 85-1430

ACTION MANUFACTURING, INC.,
Plaintiff, Appellee,

v.

FAIRHAVEN TEXTILE CORPORATION,
Defendant, Appellee,

BRAWER BROS., INC.,
Third-Party Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Martin F. Loughlin, *U.S. District Judge*]

Before
Coffin, *Circuit Judge*,
Wisdom* and Aldrich, *Senior Circuit Judges.*

Edward A. Haffer, with whom *Sheehan, Phinney, Bass & Green, Professional Association*, was on brief for Fairhaven Textile Corporation.

Irving Brawer with whom *James J. Barry, Jr.*, was on brief for Brawer Bros., Inc.

Peter Karl Marsh with whom *Marsh & Segal* was on brief for Action Manufacturing, Inc.

May 14, 1986

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* Of the Fifth Circuit, sitting by designation.

Per Curiam. Following our opinion in this case, which we concluded by charging appellant's counsel personally with attorney's fees as costs for making an improper contention, counsel moved that we withdraw that portion of the opinion, and the assessment, and, presumably in case we did not, for a rehearing en banc.[1] Out of regard for counsel, following their hearing the tape of the oral argument, we again reviewed it, and the entire record and briefs, as well as the petition itself. While we do not grant the motion to withdraw, it may be appropriate further to state our reasoning.

Without repeating the facts in detail contained in the original opinion, this was an action, tried to the court, for breach of warranty. The court found in favor of plaintiff, appellee. Paragraph 11 of the complaint had alleged, inter alia, due notice of breach. Paragraph 11 of defendant appellant's answer denied some of the other assertions, but admitted notice. The pretrial statement of disputed issues made no reference to notice, nor did defendant's opening; nor was it adverted to at trial.

Defendant was a supplier of materials that went into plaintiff's product. The complaint sought damages for allegedly defective materials furnished in the early fall of 1979. Prior to the pretrial plaintiff expanded its damage claim to include a small amount of goods supplied the preceding spring. No objection was made by defendant that this was outside the pleadings, or that there had been tardy notice. In its post-trial argument, however, defendant asserted, for the first time, that notice had been late. The court, without discussion, found proper notice.

On appeal defendant extensively briefed that plaintiff's case must fail for lack of timely notice. This prompted the judge who ultimately wrote the opinion to review the record, and, at argument, he, and a second judge, asked detailed questions why defendant had not raised the issue of notice until after trial. This produced the response, noted at greater length in our opinion, that counsel did not want to "tip . . . our hand."

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[1] Counsel also requested permission to hear the tape of the oral argument, which we granted, and this thereafter occurred. No further response followed.

On the record, the extent of plaintiff's awareness in the spring of defects in defendant's material was so slim that we might wonder whether there could have been an issue of a duty of earlier discovery, and of consequent need of notice.[2] We were disturbed, however, by quite another matter. As a general principle the presentation of claims beyond the complaint without objection is considered an informal amendment of the complaint. See *Lynch v. Dukakis*, 719 F.2d 504, 508 (1st Cir. 1983); F. R. Civ. P. 15(b). In the absence of notice to the contrary, it may be assumed that defendant does not choose to amend its answer. Anything else would be inconsistent with the universal principle that the issues in a case are to be made known in advance.

Defendant's claim now is that all that its answer admitted was due notice as to the fall goods, ("said defects") and was inapplicable to goods supplied earlier. Even taking this at its face value we would consider such a contention lacking in the necessary candor, but defendant's position is far more extreme. "Actions' answer to interrogatory [claiming damages for June] put all parties on notice that notice had now become an issue." "[D]espite the timely notice on the *September* items, Action would be barred for *any* remedy," (viz., for the fall items, as well as the spring's.) (Emphasis in orig.) As a legal proposition, for which, incidentally, defendant cites no authority, this seems an extraordinary position. The spring goods, and the fall goods, were separate orders, and separate shipments. At the very least, and we cannot emphasize this too highly, if notice was considered no longer admitted as to the fall goods, this would be in flat contradiction to an answer which stood unamended.

In light of the pleadings, and the pretrial silence, it was difficult to think how defendant's counsel could have thought his position with respect to the September goods so obvious that plaintiff's counsel were on actual, as distinguished from possible legal, notice that notice as to these goods was now an issue. We accordingly in-

[2] Plaintiff knew it had problems with its own product, but did not realize they were traceable to defendant's material.

quired as to this during oral argument, and counsel conceded they maintained silence to avoid tipping their hand, in the hope that plaintiff would not try to "fool" them, viz., by offering (false) evidence to meet it. In other words, counsel was hoping to fool the plaintiff. This method of trying cases has been outlawed in the federal court by the Rules of Civil Procedure since 1940.

At the least, defendant's pursuing this matter on appeal must be characterized as frivolous. Under such circumstances we, and other circuits, have felt that counsel should be charged, whether under 28 U.S.C. § 1927, or F.R.A.P. 38. *Good Hope Refineries, Inc. v. Brashear,* 588 F.2d 846, 848 (1st Cir. 1978); *Limerick v. Greenwald,* 749 F.2d 97, 102 (1st Cir. 1984); *Commonwealth Elec. Co. v. Woods Hole, etc. Steamship Authority,* 754 F.2d 46, 49 (1st Cir. 1985); *United States v. Potamkin Cadillac Corp.,* 697 F.2d 491, 494-95 (2d Cir. 1983), *cert. denied,* 462 U.S. 1144 (3 Justices voting to award respondent damages for frivolous appeal, Sup. Ct. Rule 49.2); *Tedeschi v. Barney,* 757 F.2d 465, 466 (2d Cir. 1985), *cert. denied,* 106 S.Ct. 147; *Hughes v. Hoffman,* 750 F.2d 53, 55 (8th Cir. 1984); *McConnell v. Critchlow,* 661 F.2d 116, 118-119 (9th Cir. 1981); *In re Oximetrix, Inc.,* 748 F.2d 637, 644 (Fed. Cir. 1984). In *Gianfriddo v. Western Union Tel. Co.,* ____ F.2d ____ (1st Cir. 3/21/86), we noted that counsel or client should determine the responsibility; here it is clearly counsel's.

Our opinion will stand, subject to pending motion for review en banc.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1429 ACTION MANUFACTURING, INC.,
Plaintiff, Appellee,

v.

FAIRHAVEN TEXTILE CORPORATION,
Defendant, Appellant.

Before
Campbell, *Chief Judge,*
Coffin, Bownes, Breyer and Torruella,
Circuit Judges.

ORDER OF COURT
Entered: May 14, 1986

Upon consideration of the "Verified Petition For Rehearing En Banc" by appellant. Fairhaven Textile Corporation.

It is ordered that said petition for rehearing en banc be, and the same hereby is, denied.

By the Court:
Francis P. Scigliano
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1429 ACTION MANUFACTURING, INC.,
Plaintiff, Appellee,

v.

FAIRHAVEN TEXTILE CORPORATION,
Defendant, Appellant.

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BRAWER BROS., INC.,
Third-Party Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Martin F. Loughlin, *U.S. District Judge*]

Before
Coffin, *Circuit Judge*,
Wisdom* and Aldrich, *Senior Circuit Judges*.

Edward A. Haffer, with whom *Sheehan, Phinney, Bass & Green, Professional Association*, was on brief for Fairhaven Textile Corporation.

Irving Brawer with whom *James J. Barry, Jr.*, was on brief for Brawer Bros., Inc.

Peter Karl Marsh with whom *Marsh & Segal* was on brief for Action Manufacturing, Inc.

February 20, 1986

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* Of the Fifth Circuit, sitting by designation.

ALDRICH, *Senior Circuit Judge.* In this suit by Action Manufacturing, Inc., tried to the court, for breach of warranty of fabrics which were, concededly, "expressly warranted by [defendant] Fairhaven [Textile Corporation] and [third party defendant] Brawer Bros. [Inc.] to be first quality," the first ten pages of Fairhaven's brief are devoted to a claim of lack of timely notice of breach. Although, actually, this was a non-issue, it is such a conspicuous example of improper advocacy that we, too, will discuss it at the outset.

Paragraph 11 of the complaint commenced, "11. Immediately upon discovery of said defects in the nylon Plaintiff notified Defendant ...." Defendant's answer read, "11. As to any defects, denied. As to notification of a problem, admitted ...." This answer was never amended, nor sought to be amended. The pretrial statement of issues made no mention of notice, let alone alleged untimeliness. Neither did defendant's opening to the jury.

During trial evidence was introduced, with relation to another issue, which, standing alone, might support a contention that plaintiff's notice of breach was tardy. That issue was not mentioned, however, until defendant's post-trial argument and requests. The court's response was a short rejection. More than half of Fairhaven's brief is now devoted to this alleged error.

Passing the fact that the court's rejection on the merits would not appear to have been error in any event[1], pressing it disregards the elementary principle that, unless by agreement, actual, or implicit from conduct, a matter once conceded is not later in dispute simply because some evidence, admitted on another issue, could be claimed to contradict it. 6 Wright & Miller, Federal Practice and Procedure § 1443, p. 466 (1971); *see Vargas v. McNamara,* 608 F.2d 15, 18 n.3 (1st Cir. 1979); *cf.* F.R.Civ.P. 15(b). Otherwise an attempted withdrawal of an admission in the pleadings after the case has closed is the unfairest kind of surprise, even, perhaps, for

[1] Fairhaven's argument presupposes that plaintiff was engaged in self-destruction, not an easy contention.

a court that is conducting a bench trial and might wish elucidation,[2] and particularly unfair to unsuspecting counsel.

This was without excuse. During oral argument a colloquy revealed that, prior to the pretrial statement of issues, defendant had discovered grounds for claiming that its admission in its answer was incorrect, but had concluded to remain silent. Asked why, counsel said,

> "[W]e had a reason for not tipping our hand."
> Court. "You wanted to fool the court?"
> Counsel. "No, we did not. We did not want to be fooled by the [plaintiff.]"

It would be difficult to conceive of a more unabashed piece of sharpness. Don't change your pleading, or let the other party know what he has to meet, or he'll fool you — with counterevidence. Yet Fairhaven would claim that plaintiff's "implication of surprise at Fairhaven's notice argument is ironic and disingenuous." This is not even sense, let alone fair.

For defendants to pursue this matter on appeal is not merely frivolous, it is an imposition on appellee and the court. For such a severe disregard of counsel's duty it is appropriate to charge counsel personally with attorney's fees as part of appellee's costs. 28 U.S.C. § 1927; *see United States v. Nesglo, Inc.*, 744 F.2d 887, 892 (1st Cir. 1984); *Good Hope Refineries, Inc. v. Brashear*, 588 F.2d 846, 848 (1st Cir. 1978).

Turning to the merits, defendants raise two principal points: that the court erred in finding their goods faulty, and in overstating the damages. Here, at least, defendants recognize settled law, that they must show the findings to have been clearly erroneous. F.R.Civ.P. 52(a). Unfortunately, they adopt the not uncommon practice of assuming the correctness, or superior quality, of their own evidence; one cannot read their briefs without a feeling of being asked to review the case de novo. For example, we are told at

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[2] *See, e.g.*, in another connection,

> The Court: I want to ask you a question, because I can ask questions. I'm the one that's going to decide this.

length how defendants' expert had higher qualifications than plaintiff's. This is not the stuff by which "clearly erroneous" is established.

Even worse is the brief of third party Brawer Bros. which, as the initial actor and party ultimately responsible, took the laboring oar as to the quality of the material. The principal defective goods were 70 denier lightweight nylon, finished by Fairhaven and supplied to plaintiff in 1979 as first quality. Plaintiff laminated the material (glued it to paper) and supplied it to shoe manufacturers, largely in Europe. When it bubbled, plaintiff, admittedly after many tests, claimed the material to have been defective. Defendants, in response, charged improper processing by plaintiff.

One of the pretrial tests ultimately conducted involved Fairhaven's 1982 material and a sample of its 1979 material. A witness for plaintiff having conceded that the later material was first quality, Brawer asserts that the witness conceded thereby that the earlier was first, as well. This concession, it says, follows from Brawer's testimony that the two materials were the same.

Brawer went even further. In its reply brief it complains vigorously that plaintiff's brief wrongly charged it with admitting the use of second-grade yarn in its 70 denier fabric. Yet Irving Brawer had testified, "[T]here is no question in my mind whatever that some fabrics were made out of yarn that was designated by DuPont as second quality." His preceding and subsequent testimony made clear that this phraseology was an admission, not a denial. The admission does not disappear because Brawer testified that this second-grade yarn was first quality, (with which compare his testimony, "[E]verything we buy from DuPont is bought without any warranties on their part except when we specifically ask for first quality yarn from DuPont to be used in some of our other operations."). Nor was the admission struck by Brawer's testimony that it is possible to make first quality goods out of second-grade yarn.

An appeal so presented does not make necessary our recitation of the evidence contained in seven volumes of transcript and many

exhibits that might be due an appellant who presents supported representations of manifest error. The significant fact is that there was ample evidence supporting the court's findings, both on liability and damages. Nor did the court make any improper rulings. The court was warranted in concluding that plaintiff suffered more than the dollar loss attributable to the goods directly involved. A customer who finds the milk turned one day may look elsewhere for it another.

Plaintiff conceded at oral argument that it would not pursue its cross appeal of the court's grant of Fairhaven's counterclaim. The judgment is affirmed in all respects, with costs to Action.[3] Fairhaven's counsel is charged personally with attorney's fees in the amount of $2,000. This, we may add, is punitive, *see Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226 (7th Cir. 1984); *cf. United States v. Nesglo, Inc.*, ante, 744 F.2d at 892, and not a business expense. *Cf. Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958).

Affirmed.

[3] Strictly, we would have assessed double costs, but Fairhaven does prevail on the minor cross-appeal.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Action Manufacturing, Inc.

v. #C80-204-L

Fairhaven Textile Corp., et al.

Findings of Fact and Rulings of Law

The plaintiff has brought this action alleging that the defendants breached express and implied warranties of merchantability in the sale of nylon material to the plaintiff in the year of 1979. RSA 382-A:2-313, RSA 382-A:2-314. The plaintiff corporation was incorporated in the State of New Hampshire in late 1977. Lawrence A. Gaffney and John McElroy were the principals who started the company and each invested the sum of $100,000. In addition to the $200,000 contributed by these individuals, a Small Business Administration loan was procured in the sum of $600,000.

The plaintiff deals mainly with shoe companies both domestically, such as Brown Shoe Company and European companies. The plaintiff mainly deals with what is known as substrates which comprise goods to which adhesive material is applied. The plaintiff claims that the defendant expressly warranted first quality goods. Material known as 70 denier was sold by the defendant Brawer Brothers to the defendant Fairhaven Textile Corporation which in turn sold the product to the plaintiff. The plaintiff's claim is that the product sold to it was defective. The defendants collectively blame the problem on the plaintiff's manufacturing process and the defendant, Fairhaven, has a counterclaim in the agreed upon sum of $33,543.92. Fairhaven has also brought an indemnification action against Brawer Brothers. Brawer Brothers owns 50% of Fairhaven.

The claim of the plaintiff against the defendants are in six areas. 1. for inferior goods, material and labor; 2. that the plaintiff was

forced to sell damaged goods as seconds; 3. that the plaintiff was unable to keep up with orders from purchasers and had to send goods by means of air freight, thus increasing their cost; 4. incidental damages such as storing defective goods for forty-five months; 5. lost sales, profits and damage to reputation in Europe and the United States and 6. the retardation of the development of its business.

The plaintiff manufactures pressure sensitive tape products, which are fabrics or other materials which have been coated with an adhesive substance, and which, when applied with pressure to another material, will adhere to the latter. The products are largely used in the manufacture of shoes, and to a lesser extent in other manufacturing industries.

There are three principal processes involved in the manufacture of pressure sensitive tapes. The first is the manufacture of the adhesive substance, which involves the combining and treatment of various ingredients in a chemical and mechanical process. Next is the coating, which involves the spreading of the adhesive on the fabric or other substrate and the drying of the adhesive as the coated substrate passes through heated ovens. This material is then wound onto master rolls, which are subsequently subjected to a slitting process, in which the tape is cut into narrower rolls, with varying widths.

Brawer sold the material which is the subject of this law suit to Fairhaven which more or less acted as a conduit in its ultimate sale to the plaintiff.

Lawrence A. Gaffney of Wolfeboro, New Hampshire from December, 1977 on was in charge of European sales which is the main crux of this suit.

Gaffney has a great deal of experience in the business. Prior to starting his own company, he was employed by Ideal Company which at one time accounted for approximately seventy percent of sales of pressure sensitive tape to the shoe industry. Reference is made to exhibit FUU (1-75) which is the Master's Report of *Chelsea Industries v. Gaffney and McElroy*, Massachusetts Superior Court.

The court has read the lengthy report of the Master as evidenced by exhibit FUU (1-75) which candidly is not flattering to Mr. Gaffney or Mr. McElroy.

Ideal Company is a subsidiary of Chelsea Industries. Gaffney and McElroy incorporated or formed the plaintiff corporation at the end of 1977. Both Gaffney and McElroy invested $100,000.00 each or a total of $200,000.00 plus a $600,000.00 Small Business Administration Loan.

The plant was constructed prior to December, 1977. The plaintiff corporation was involved in litigation with a competitor soon after it commenced doing business and for a period of eight months was enjoined from manufacturing in the United States. The plaintiff grossed $24,000.00 in six months during 1978. In December, 1978 the plaintiff corporation reorganized.

It sold its plant, property and equipment to its largest account in Europe. This was to Jaeger Brothers of Germany in a sale and lease back arrangement.

Gaffney stated that plaintiff's first contact with the defendant, Fairhaven was through Fairhaven's agent, Sam Werber. Werber contacted the plaintiff who provided Werber with samples of yarn and showed him the plant.

The following was explained to the court that 70 denier is a type of yarn terminology, such as hand of goods means softness or hardness of the goods, tensile strength, warp threads, length of full cross threads, coating, looms, cleaning and textile finisher.

Eventually Gaffney approved the decision to purchase material from Fairhaven at the same price paid to other suppliers. At this time there wasn't any mention of the other co-defendant Brawer. Gaffney stated that he was not aware of Brawer Brothers until after suit was instituted. The Fairhaven goods were prepared for coating and guaranteed first quality goods.

In September, 1979 complaints were received from France stating bundled rolls had strange configuration.

Photographs 1A, 1B, 1C and 1D were taken at a plant in Ireland. 1A depicts 8 rolls standing on end. 1B material lying flat,

1C bundles of 70 denier rolls showing outside wrinkles and 1D depicting a rewind machine.

The plaintiff was also called concerning problems in Ireland including 200 denier goods.

Efforts were made to ascertain the cause of the problem, tension machine, laboratory tests including the paper. The nylon grows larger than the paper because of bubbles. Richard Thompson of the Smith Paper Company was called. Nylon was steamed, paper given different tension, different temperatures, tried in the oven. Some sheets were sold to Jaeger.

In the summer of 1980 Schneider and Fairhaven goods were tested according to Gaffney under the same conditions and Fairhaven goods were distorted, Schneider goods were not.

Gaffney testified that he kept getting telexes of complaints and had to send replacement goods by air freight which was fifteen times more expensive than the usual method of shipping by boat.

Exhibits 12A through N are a series of telexes from the plaintiff to Jaeger and Jaeger responses concerning problems, complaints, air freighting of goods and efforts to solve problems with the goods.

Exhibit 10 A-1-8 dated October 17, 1979 is captioned freight charges regarding replacements for defective goods.

Exhibit 10 B-1-17 is captioned October 3, 1979 freight charges regarding replacements for defective goods.

Gaffney stated that he called Werber a number of times for help. Six months later a meeting was arranged at the plaintiff's plant with two representatives from Fairhaven but nothing was accomplished.

Exhibit 28 is a letter dated February 29, 1980 to Mr. Fagan of Fairhaven claiming that Fairhaven 70 denier nylon was defective and totalled $37,362.13. 200 denier nylon was defective and totalled $13,198.54 or a grand total of $50,560.67. In addition claims were made for loss of sales and air freight to replenish inventories in Europe and loss of customers, sales and profits.

Exhibit 19A is a compilation of sales for the fiscal year 1978-79 totalling $1,023,054.

Exhibit 19B is a compilation of sales for the fiscal year 1979-80 totalling $1,735,762.

Gaffney testified regarding European sales losses using exhibits 19A and 19B claiming a loss of $713,000. His computation was based upon five months prior to the problem, five months during and five months after. He also testified that 30% were the gross profits on European sales. Based on five months, gross profits allegedly lost amounted to $60,000.

Gaffney stated that in September and the fall and winter of 1979 goods were returned from Ireland in twenty foot containers which McElroy inspected and then stored at Gonic Mills for $150.00 monthly. Half the space was used for other purposes so the cost was $75.00 monthly. Subsequently in 1982 the goods were moved to plaintiff's plant.

Exhibit 20 A-1 16 dated November 8, 1979 is shipment of salvage 170 & 175 sheets seconds at reduced price.

Exhibit 20 B1-20 dated April 15, 1981 is shipment of salvage 170 & 175 sheet seconds at reduced prices.

Exhibit 20 C-1-10 is shipment of salvage 170 & 175 sheet seconds at reduced prices. All of the aforesaid shipments were to Jaeger in France.

Gaffney stated that the returned goods were isolated and the employees were told not to use them.

Exhibit 31 is a bulky exhibit of 70 denier nylon used as part of a test of four different types of nylon. With experts present, McElroy located an original roll of Fairhaven goods to use in this test. The test attempted to duplicate the exact conditions. Reference shall be made in more detail regarding these tests later on in the opinion.

Gaffney testified that the plaintiff lost $111,000 in the fiscal years 1979-80, 1980-81. He further claimed that he had to borrow money in the fall of 1980 in the sum of $80,000 at interest varying between 19-21%.

Exhibit 30 is a record of lease payments paid to Textile Tape Corporation apparently a subsidiary of Jaeger, said payments

were increased according to the consumer price index in January, 1980, October, 1981 and November, 1982.

Exhibits FXX-1 are material submitted by Gaffney to Boulis and Fagan showing delamination on February 2, 1980.

FXX-2 is material tie coated September 14, 1977 showing bubbling or delamination the same date.

FXX-3 is material showing delamination.

On cross-examination, counsel questioned the witness about the fairness of the test using three year old material.

Exhibit FUU was also alluded to relative to the plaintiff corporation assuming legal costs of $172,000 because of the alleged misconduct by principals Gaffney and McElroy in the Massachusetts suit by their former employer, Chelsea Industries. The credibility of both Gaffney and McElroy were attacked by counsel based on the Master's Report in exhibit FVV.

Exhibit FDD was introduced with special reference to page 5 where McElroy on October 4, 1978 complained relative to too many seams in Schneider goods.

The complaints against the co-defendants only pertain to 70 and 200 deniers.

Exhibit FAA is Action business records, relating to purchase and disposition of Fairhaven products.

Reference is made to John McElroy's deposition at page 79 on cross-examination of Gaffney where it was alluded that the temperature was too high for nylon. McElroy didn't testify at the trial.

Co-defendants introduced exhibit FT(1-3) New Hampshire Supreme Court advance sheets where McElroy sued Gaffney to recover on a promissory note.

Exhibit GG is a four page memorandum concerning two problems, tension, loss in width, gain in length. M.D. means machine direction.

Exhibit FEE dated April 29, 1982 is from United States Testing Company, Inc. who examined a sample from Fairhaven and one from another supplier. Under remarks is the following.

Exhibit FPP are plaintiff's business records introduced to show the large turnover in its employees. Forty-two had been terminated or left.

Exhibit FWW are plaintiff's records relating to sales in September and October, 1979.

Exhibit FU and 22 are the same and relate to credits to customers.

Gaffney stated that he was not conversant with the formula of ingredients, but McElroy was. After other tests it was determined by the plaintiff that the cause of the problem was the nylon by deduction.

Exhibit FKK lists possible causes of wrinkling. Defense counsel on cross-examination alluded to FKK-14 which is an interoffice memorandum from John McElroy to Larry Gaffney and Dave Wormwood which states the following.

> Lloyd Steves had an idea that makes sense to me. He thinks that our problem results from the nylon being heat set at *too high* temperature.

Gaffney was cross-examined through the use of McElroy's deposition. At page 38 of his second deposition, McElroy stated that he didn't know what went wrong.

Between the periods June 30, 1978 and January 16, 1980 the plaintiff purchased 190,000 70 denier and 160,000 200 denier yards from Fairhaven.

All sales in 1979 were sent to Europe. Some goods were being air-freighted to Europe prior to the problem.

Gaffney stated that $23,500 was spent trying to correct defective goods and $16,415 spent on air freight, as well as $2,400 for 75 months of storage charges.

Fairhaven was the only supplier with goods in the finished state. The plaintiff made direct payments to the finisher.

Exhibit FOO are Fairhaven invoices to the plaintiff and exhibit FWW are plaintiff's business records relating to sales from April 12, 1978 to January 1, 1981. 50,724 yards were sold in that period,

most of it from Fairhaven. Gaffney stated most of Fairhaven goods kept coming back. Between the period September 18, 1979 and November 7, 1979 14,182 yards of 200 denier nylon were sold.

Exhibit FBBB is a suit filed in the Commonwealth of Massachusetts by the plaintiff here with Lawrence A. Gaffney and Gerald R. Graff joined as co-plaintiffs against Chelsea Industries alleging loss of sales of $1,499,000.00, loss of profits of $1,203,000.00 or a total of $3,803,000.00. This suit was filed in 1981.

At this point in the trial the defendant was cross-examined by Attorney Brawer who is also a co-defendant.

Gaffney stated that $700,000 was put up by Jaeger, plaintiff's landlord.

Attorney Brawer also elicited the evidence that 350,000 linear yards were sold to the plaintiff by Fairhaven and most of the Fairhaven goods were shipped to Europe.

Exhibit 34 ID is puckered paper, 33A ID is sample nylon fabric used in tests at Albany International and when samples were cut there were experts present from all parties.

Gaffney stated his son who testified later in the trial was in charge of coating now, but not back in 1979.

Gaffney stated that sales declined in July 1980 which could have been due to the European holidays and the strong United States dollar.

Gaffney also stated that Fairhaven goods were not manufactured after September 17, 1979.

Exhibit FWW are the plaintiff's business records pertaining to sales from April 1, 1978 through April 30, 1979 comprising seventeen pages. Tapes of totals are appended to pages 13, 16 and 17 to various purchasers. See sum of 50,424 yards.

The next witness was Lois Perlman of Brooklyn, New York. She was employed by the plaintiff from December 1977 until May, 1979. Prior to that she had been employed at Ideal Tape, pricing and purchasing and also as a Secretary to Mr. Gaffney.

She testified that she had met Sam Werber prior to the summer of 1978. Products were discussed and sensitive adhesive tape.

Exhibit 11 is the Werber note in her writing dated September 13, 1978 which quoted prices per yard in natural and black.

The terminology greige goods as explained to the court means unfinished.

Exhibit 23A is invoices of Fairport Tape, a Fairhaven product.

Exhibit 25 is a letter dated April 25, 1979 from Lois Perlman to Sam Werber with the following excerpts from this letter.

> The 70 denier goods had broken edges. The goods look as though they had shrunk and then were pulled out to the required width.
>
> The 200 denier Oxfords are too soft. The finish is not what we usually receive and even the construction of the goods seems different. Please make sure that these goods are the 200 denier Oxfords that we order.
>
> I would also request that when Kenyon puts up our goods they should put 2000 yards on a roll—maximum. We would also like the rolls properly packaged. They now come in on a skid, lying down with a piece of cardboard on top and strapped. The rolls are not completely covered and the material gets dirty.
>
> Please advise us what is the difference in the 200 denier Oxford as soon as you get this sample.

Lois Perlman received stock in Action but she returned it when she left their employ.

Irving Brawer of Haledon, New Jersey followed Lois Perlman to the stand. He has a wealth of experience and knowledge of the textile industry as evidenced by his testimony on direct and cross-examination.

Brawer dealt with Milliken to weave its goods. See exhibit 35 which is an acceptance order to weave 710,000 yards. Brawer Brothers was to supply the yarn. ROM Weaving means Run Of The Mill. It also means no warranty. Brawer explained that denier relates to length and his major purchases are from Dupont. He explained some second quality goods purchased from Dupont are as good as first quality goods, but are classified as second quality solely because they are shorter. Attorney Brawer also explained

many textile terms. Yarn known as tail has as its purpose to tie one package to another so yarn can continue to be woven. "Transfer Tail."

Nylon is made from oils and chemicals and has to be dryed properly.

His firm has been purchasing from Dupont since 1921 and in his opinion their products are the best in the world. Frayed filaments are broken filaments.

Exhibit 16 is defendant Brawer Brothers Dupont quality indicator codes.

Exhibit 17 is Dupont's offer of sale to Brawer Brothers in March, 1983. The eighth line down shows a purchase of 64,313 pounds, the figure 11 means tails.

When interrogated the witness stated that the price differential between first and second quality is 5 to 10 cents.

Exhibit 18 A D which is Dupont offers of sale to Brawer Brothers on the third page line 14 shows a charge of $1.25 for a different denier i.e. 50.

Brawer also lauded the capabilities of Milliken stating that they had 92-96% efficiency as weavers.

He also stated that 160,000 of the 350,000 yards sold to the plaintiff were 200 denier; 190,000 70 denier. The transactions were done by Milliken weaving Brawer Brothers material, which were returned to Brawer Brothers, sold to Fairhaven more or less as a conduit, then sold to the plaintiff. A Mr. Margolis is comptroller for both co-defendants.

Exhibit 36A is evidence of charges by Milliken to Brawer Brothers.

Brawer stated that all goods sent to the plaintiff were first quality. When Milliken would run short of goods supplied by Brawer Brothers they would use their own.

Brawer himself did not handle sales to the plaintiff.

Exhibit 37 are invoices from Dupont to Brawer Brothers of second grade whites only.

The background concerning the relationship of Brawer Brothers and Fairhaven is that Fairhaven was a customer until 1966 when

it became insolvent. There was a merger. Brawer Brothers owns 50% of Fairhaven. Fairhaven is a textile convertor. Brawer Brothers is the yarn dealer and supplier. Brawer, subject to objection testified that his company never had a similar complaint over the years. He is now seventy-four years of age and has been involved in management for 42 years.

Exhibit 37A-G pertains to some weaving and non-weaving yarn.

Plaintiff's next witness was Adi B. Chehna of Chelmsford, Massachusetts.

He formed a company in August of this year known as Textile Services. This involves the testing, investigation and inspection of fabrics. Chehna has a BA and a Masters degree from Lowell Textile.

Chehna had been employed at Albany International prior to going into business for himself. He did senior research there until August 15, 1983. He started his employ there in 1974. In 1976 he worked full time on claims and complaints. This was 100% in the textile field. In the past seven years he has investigated more than 50 cases or claims involving nylon fibers. He claims his success ratio is 90%.

He stated researching involves the following. What did the finishing process involve, the state of the fabric before, weaving size, yarn used in the warp or the length treated with process, oils, starch removed, dyed or dried.

The witness stated that textile finish adds stability. To have an even coat he stated an even amount of latex must be applied left to right. In the production of nylon yarn the raw material or chips are fed into a hopper and became viscous, it then goes through holes called spinarettes so called, then solidified which are called filaments, can be wound or put in draw zone to stretch, i.e. density or denier.

Chehna explained technical terms such as low module product which means that the material is less stiff. White yarn will not get the same shade as yarns which are dyed or a variation of shades. He also stated that by mixing lot numbers it could cause streaking.

While at Albany International, he analyzed greige and 70 denier yarn at plaintiff's premises when McElroy asked for help. Chehna recommended a trial at the plant using Fairhaven and goods from other companies. Brawer and other experts were present. Products used were Schneider, new Fairhaven, old Fairhaven and Ix's. The same roll of papers was used, rolls were cut at 100 yards. The following day the rolls were laminated on release paper. Speed was checked, temperatures and amount of tie coat added. This was in November, 1982. After the plant trial, the parties agreed to seal the roll and take it to the laboratory. Samples were sent to Brawer. Exhibit 33 AID is the sample.

On test modules of yarn, Chehna stated that Schneider, new Fairhaven and Ix's were comparable 32.6, 30 grams per denier; old Fairhaven 17.4 grams per denier which is a significant difference. Less modules, less stiff and less resistance and lack of crystals.

Chehna's opinion was that the cause of the problem was product failure. The manner it reacted to tensions and the lacking of stillness.

Chehna then was cross-examined by Brawer who alluded to Exhibit FB3 which are plaintiff's business records pertaining to the dispute with Fairhaven. On July 11, 1980 there was evidence that Ixs good delaminated.

Reference was then made to exhibit FFF and 15A which are identical exhibits. They are reports from Albany International to plaintiff's counsel dated August 20, 1982. Subject: Determine the Cause of Delamination of Woven Nylon Fabric from Release Paper.

Tables 1, 2 and 3 are incorporated in this opinion.

Table 1

Results of Greige Fabric Analysis

Fabric Supplier	Fabric Weight (oz/yd²)	Ends/ Inch	Picks/ Inch	Nonfibrous Content (%)	Yarn Filament Count Warp	Yarn Filament Count Filling
Fairhaven	1.67	100	72	3.1	34	34
Schneider	1.63	102	68	1.3	17	34
Glen Raven	3.08	62	50	4.3	68	32

Fiber Type	Yarn Denier Warp	Yarn Denier Filling	Yarn Tenacity (gms/denier) Warp	Yarn Tenacity (gms/denier) Filling	Yarn Elongation at Break (%) Warp	Yarn Elongation at Break (%) Filling
Nylon 6,6	74.5	76.4	4.34	4.20	34.0	32.6
Nylon 6,6	75.9	74.9	4.07	3.76	31.4	34.0
Nylon 6,6	215.0	216.0	3.96	4.03	21.2	18.3

Table 2

Nonfibrous (Finish) Content of Submitted Finished Fabrics

Fabric Supplier	Nonfibrous Content (%)
Fairhaven	1.9
Schneider	2.5
Glen Raven	1.4

Table 3

Dimensional Change in Finished Samples

Fabric Supplier	Temperature (°F)	As-Received Warp	As-Received Filling	Finish Removed Warp	Finish Removed Filling
Fairhaven	250	0.5	0.2	0	0.1
	300	0.8	0.6	0.1	0.1
	350	2.0	1.2	0.6	0.4
	375	2.1	1.3	0.8	0.4
Schneider	250	0.3	0.3	0.1	0
	300	0.8	0.6	0.3	0.1
	350	1.8	1.0	0.6	0.2
	375	2.0	1.3	0.8	0.5

The recommendation was that Fairhaven, Schneider and Glen Raven fabrics be processed at plaintiff's plant at the same time in the presence of Albany International Research, to obtain laminated supplies for further testing.

Exhibit FEE is a report dated April 28, 1982 from United States Testing Company to plaintiff's counsel in which samples of Fairhaven and goods from another supplier had been submitted to determine similarities and/or differences in the submitted samples. Under remarks and other observations is the following.

REMARKS:

The above indicate that both samples are of "good quality" nylon, and that the warp yarns and the filling yarns in both samples are probably from the same yarn producer.

OTHER OBSERVATIONS:

Microscopial examinations of specimens from each sample stained in DuPont identification stain #4 reveals sample #1 has accumulations of the non adhesive coating on the top surface of the fabric in the bubble areas, while sample #2 does not.

Examinations under ultraviolet light reveals:

a) The adhesive layer of sample 1 is more fluorescent than that of sample 2.

b) The non adhesive coating (after solvent removal of the adhesive) of sample 1 is more fluorescent than that of sample 2.

c) The base fabric of both samples is non fluorescent after removal of the adhesive and non adhesive coatings.

The remainder of August 22, 1983 commencing at 1:48 P.M., with a brief recess and until the court recessed at 4:20 P.M. was involved in the inspection of the nylon roll and examination by all counsel in an aura of informality.

Exhibit 15 B ID is a supplementary report of Albany International dated March 25, 1983 which is supplemental to the August 20, 1982 report.

The following is culled from Exhibit 15 B ID.

Storage of Laminated Fabric

The laminated fabric was stored in a closed room at AI Research laboratories. The ambient air temperature and humidity, although not specifically controlled, was relatively stable and not subject to extremes or variations that occur in other parts of the laboratory.

Inspection of Laminated Fabric

On December 17, 1982, Messrs. Gaffney, McElroy, Marsh, Brawer, Grant and Panto met to open and inspect each of the sealed laminated rolls from the November 11, 12, 1982 plant trial.

The rolls were opened and inspected on a Measuregraph machine. This machine is used in textile plants for the inspection of fabrics. The first roll inspected contained fabrics made from 70 denier yarns. A comparison of the condition of the laminated fabrics showed that the *Original Fairhaven goods* (the subject of this dispute) clearly exhibited a delamination from the release paper, which was described by Mr. Grant as "wormy." The other three fabrics in this roll did not show the "wormy" condition. It was noted that the "wormy" appearance exhibited by the Original Fairhaven goods processed in the recent plant trial was the same as that exhibited by some of the laminated Fairhaven products submitted earlier to AI Research by Action Manufacturing as representative of the problem in products manufactured by Action in 1980.

It was agreed that samples of Original Fairhaven laminated fabric from the recent plant trial, showing this "wormy" condition, would be forwarded to Mr. Brawer for his further examination and testing (see AI letter of December 23, 1982, copy attached).

The second roll inspected contained fabrics made with 200 denier yarn. Both fabrics in this roll showed that delamination had occurred, however, they did not exhibit the "wormy" condition noted earlier on Original Fairhaven goods. The delamination in these fabrics was consistent with the earlier prediction of Action representatives.

Laboratory Work

Samples of the *finished* fabrics constructed from 70 denier yarns and used in the plant run on November 11 and 12, 1982 were submitted to Albany to establish whether they possessed any important differences in physical/chemical properties which could account for the "wormy" condition noted on the laminated Original Fairhaven goods.

Warp yarn specimens from each of the samples were tested for denier, breaking load and elongation. Additionally, the tenacity and textile modulus were obtained. The textile modulus is defined by ASTM as:

Textile Modulus—The ratio of change in stress to change in strain in the initial straight line portion of a stress-strain curve following the removal of any crimp. The ratio is calcu-

lated from the stress expressed either in force per unit linear density or force per unit area of the original specimen, and the strain expressed either as a fraction of the original length or as percentage elongation.

A comparison of data showed that the warp yarn textile modulus of the Original Fairhaven product was significantly lower than that of other submitted finished products. The textile modulus of warp yarns in the Original Fairhaven product was determined to be 17.4 grams per denier (gpd), whereas the textile modulus of warp yarns in New Fairhaven, Schneider, and Frank Ix products was determined to be 32.6, 30.5, and 30.9 gpd respectively. This finding strongly suggests that the warp yarns in the Original Fairhaven product possess important morphological differences when compared to warp yarns in fabrics identified as New Fairhaven, Schneider or Frank Ix.

As a result of the observed differences in modulus, fabric and warp yarn specimens from New Fairhaven, Schneider and Original Fairhaven finished products were subjected to analysis using Differential Scanning Carorimetry (DSC).

Differential Scanning Calorimetry (DSC) is a thermoanalytical technique used for the characterization of energy transitions occurring in a polymer (fiber) as a function of temperature and is used to measure the degree of crystallinity. It is well known that synthetic textile fibers are comprised of amorphous and crystalline areas, and the degree of crystallinity is a significant contributing factor to fiber tensile properties, such as strength, modulus and elongation.

DSC analysis clearly showed that a 5-10% difference in crystallinity exists between the Original Fairhaven product (i.e. warp yarn and fabric), and the other products tested. More specifically, the Original Fairhaven product possesses the least crystallinity; the crystallinities of the New Fairhaven and Schneider products are higher, and very similar to one another. Hence, it is clear that significant morphological differences exist between the Original Fairhaven product and the New Fairhaven and Schneider products.

Discussion

The original purpose of the collaborative effort was to determine if the Original Fairhaven goods under dispute behaved

differently than other fabrics, when subjected to Action's manufacturing process.

The results of the plant trial showed conclusively that the Original Fairhaven product, after standing for approximately 30 days, behaved differently than others processed at the same time.

Laboratory work to determine the possible cause of the "wormy" delamination of the original Fairhaven goods from release paper showed that the textile modulus of warp yarns in the finished Original Fairhaven fabric was significantly lower than that of warp yarns in other fabric samples used in plant trial.

This finding indicates that the Original Fairhaven finished fabric is "less stiff" or more easily extensible than the remaining fabrics. Consequently, when handled under identical processing conditions as the other fabrics, it can be expected that it would behave differently when laminated to release paper and allowed to remain in storage for a period of time.

The use of Differential Scanning Calorimetry confirmed that the finished Original Fairhaven product is significantly different in polymer morphology than either the finished new Fairhaven or Schneider products which did not exhibit the "wormy" delamination.

Conclusion

Based on the results of the plant trial conducted on November 12, 1982 and the physical testing of finished fabrics, it is concluded that the Original Fairhaven product possesses important inherent physical/chemical differences with respect to modulus and crystallinity. In our opinion, these differences are causative factors in the failure of that product, which was the object of the investigation.

Exhibit 38 is work papers of old and new samples of Fairhaven. Chehna stated that the 70 denier old Fairhaven goods showed puckering and delamination. He also stated that no way could the manufacturing process cause the problem. He also discounted the age factor or humidity factor relative to the old Fairhaven goods.

Lawrence Gaffney of New Durham, New Hampshire, the son of one of the plaintiffs co-owners next testified. He presently is the

Assistant Plant Manager and is in charge of production. He also deals in sales one day a week and is also in maintenance.

In January, 1980 he worked the second shift and was in charge of coating operations. Coating is normally done every day and there are two coating machines known as 1A and 1B for tie coating and adhesive coating. Both machines can do the same operation.

In 1979 he stated that the coating process involved application by use of a dipper. Tie coating was also called scrape coating. The knife used could be scaled as low as 1/1000 of an inch and 4/16s of an ounce to the square yard. If the coat was too heavy it couldn't get through the machine. Records were kept of the weight of each roll as they were run.

Regarding heat controls, Gaffney stated each oven had a sensor and where the fabric came through it was checked by a thermal device. He stated problems were incurred initially when the machinery was installed in 1978. There were giant blisters. Exhibit 33 AID allegedly depicted small non heat blisters. He stated that no problems were incurred with uneven coating.

Regarding tension control on substrate, Gaffney stated this was checked by an air operated brake similar to a disc on a motor vehicle.

He testified that when rolls were returned in 1979 they were stored at the plant in Sealand containers. Later approximately 107 rolls were moved to a warehouse one mile distant, put aside and marked. Subsequently, they were moved back to the plant. He stated that the lot sheet determines the supplier.

The witness also referred to exhibit 3, the April 15, 1983 inventory of returned goods from Jaeger of approximately 108 rolls not including sheets. He stated 4 rolls were not Fairhaven. He stated total material costs were $29,829.25 plus $249.38. He also stated that the sheet inventory was $8,693.59. The court's figures were $38,522.64.

He examined the rolls in 1982 to see if they could be unwound on the machine. He stated none were of first quality.

On cross-examination by Brawer, he stated that he saw all the rolls which were returned from Ireland and he examined the entire roll introduced as exhibit 39, also known as roll 40. Also 18 rolls were rewound.

Attorney Hafer cross-examined relative to exhibits FB and FCC (1-95) page 4 which relates to the purchase and disposition of Fairhaven products.

Attorney Barry cross-examined relative to his past work history and background. He also elicited the fact that in 1979 there were approximately 28 different employees involved in the coating process at the plaintiff's plant.

The witness also stated that in the 1A oven using a water base there can be a 1° variation from the setting. Further readings inside and out of the oven can be a 5° plus or minus.

The final witness that the plaintiff called was Cushman Colby, a C.P.A. He helped to form the plaintiff and participated in its reorganization in the fall of 1978. The record shows why evidence of business retardation was not permitted to be introduced by the witness. The plaintiff's offer of proof on the issue is also on the record.

The plaintiff rested.

Attorney Hafer stated that regardless of the third party complaint of Fairhaven against Brawer Brothers, the goods were first quality and if defective were due to the manufacturing process. Attorney Barry also stated that the goods were first quality.

Irving Brawer was recalled as the first witness. Regarding the test he supplied new goods to Fairhaven — he was present at the tests in November, 1982 and the inspection of test results on December 17, 1982. He stated that the 1982 Fairhaven goods were the same as those supplied in 1979 and were received from Dupont. Milliken wove with identical looms. The witness also stressed that old Fairhaven goods were over 3 years old, the new ones just a few days old.

At the test on November 11, 1982 the goods were tie coated 70 denier, then the 200 denier. Same procedure was used the next day in the application of adhesive.

During early March, 1980 samples as represented by exhibits FXX1, FXX2 and FXX3 were given to him by Mr. Fagin at his office. He also snipped portions of exhibits FYY Schneider and FZZ Glen Haven for tests. He stated that they showed delamination relative to length and width. The exhibits just alluded to were given by Gaffney to Fagin. Brawer stated that after two weeks all the exhibits showed delamination.

Brawer also testified that 70 and 200 denier were forwarded to plaintiff's plant for the test trial. He explained that merge means lot and the practice is not to mix merges. Also, nothing but 70 denier was sent to Milliken, 200 denier was purchased from Milliken and at the test all the goods looked all right with the exception of the 200 denier.

Samuel Fagin of Hartsdale, New York was the next witness. He has been the President of Fairhaven since 1966. His experience in the textile field commenced in 1938. He verified the fact that he gave exhibits FXX1, 2 and 3 to Brawer and that he received the samples from Gaffney on February 29, 1980. He also stated that two weeks later they had a bubbly delaminated effect.

Braham Norwich of New York, New York was the expert witness for the defendant.

He has impressive credentials. A 1938 graduate of R.P.I., he commenced his work career in August, 1938. Norwich was employed eventually by El Paso Natural Gas and Bancroft. He terminated his employment with Bancroft in August, 1978. He is a mechanical engineer.

His employment was varied in experience. He worked as a chemist, machine design quality control and as a technical individual.

In his employment he made rayon, spun nylon, dyed yarns, was involved with large weavers, knitting machines and also was involved in laminating.

Norwich has been designated as a fellow, has taught special courses, seminars and has published in excess of 100 articles.

In preparation for his testimony in this case he read reports of Hooper, Albany International and other data. He also examined the old Fairhaven fabric.

Mr. Norwich prepared a report dated October 14, 1982 which was sent to Fairhaven, attention of I. Brawer, exhibit FGG (1-3).

Pertinent excerpts from his report are.

> Subject: Inspect 100% nylon coated and mounted fabric and comment on the potential cause of the surface distortion.
>
> Fabric Submitted: 1 sample each
>
> Sunbrite Lot 2063, laminated
> Glen Raven 200 denier, laminated
> Fairhaven 70 denier, laminated
> Fairhaven 70 denier, laminated, (Bristol)
> Fairhaven Original fabric, 200 denier
> Fairhaven Original fabric, 70 denier
>
> Introduction: TAG was informed that Fairhaven had sold a 100% nylon fabric to Action Manufacturing (Action) to be used as shoe lining. Action applied a "tie coat" and subsequently an adhesive coat. The fabric was then mounted on a silicon treated "release" paper. Action claims the fabric distorts and forms bubbles and ridges. TAG was given laboratory reports which analyzed several characteristics of the Fairhaven and other fabrics.
>
> Conclusion: Based upon the laboratory reports, TAG observations, and TAG experience with fabrics, it is concluded that the Fairhaven 200 denier fabric is similar to the Glen Raven 200 denier fabric and is similar to parchment finished nylon fabrics in the market.
>
> It is believed the distorted fabric surface is caused by variations in the adhesive or its application and from excessive stretching of the fabric during coating.

Succinctly his opinion was that the problem was in the manufacturing process.

At page two of exhibit FHH in regard to the specimens he stated.

> Specimens were cut from a smooth section of each of the mounted samples. The specimens were heated at approxi-

> mately 200° F for one minute. This treatment approximately 200° F for one minute. This treatment produces the effect of aging of the fabric at normal temperature by softening the adhesive. It was observed that the fabric surfaces bubbled. The 200 denier specimens were removed from the release paper and mounted on a soft finish paper. The filling yarns per inch were observed to have increased. The fabric was removed from the paper and it was observed that less paper fiber adhered to the bubbled areas than to the non-bubbled areas although all areas had been equally pressed to the paper.

According to Norwich, he wrote the standards for the tests that Chehna used. This was with reference to the similar exhibits introduced as 15A and FFF C1-51. In his opinion, tables 1, 2 and 3 were all right. He pointed out in table 1 at page 3 of exhibit FFF(1-5) that Fairhaven yarn 70 denier was significantly better than Schneider or Glen Raven. Comment was also made on the age differential of the yarns. Norwich was not very pleased with the March 25, 1983 tests, see exhibit 15 B ID i.e. using new with old goods. He stated nylon has age problems.

In explanation he referred to his experience during World War II with nylon parachutes due to the lack of silk. He stated that after one year the inventory on nylon parachutes had to be refinished. According to him, nylon contracts with heat, has a memory and wants to revert to its original form. Softness may swell the nylon on variations in temperature and humidity.

Norwich then referred to Exhibit 15B ID especially the following. The textile modulus of warp yarns in the original Fairhaven product was determined to be 17.4 grams per denier (gpd), whereas the textile modules of warp yarns in New Fairhaven, Schneider and Frank Ix products were determined to be 32.6, 30.5 and 30.9 gpd respectively.

> This finding strongly suggests that the warp yarns in the Original Fairhaven product possess important morphological differences when compared to warp yarns in fabrics identified as New Fairhaven, Schneider or Frank Ix.

It was Norwich's opinion that this was due to aging and inevitable the way the machinery was set up. Further that this was not a respectable test. He further stated that the machinery could be set up in a different manner when dealing with three year old nylon.

On cross-examination the witness stated the knife blade is critical, tension and the amount of adhesive used.

The witness was cross-examined extensively about Exhibit 39 which was a 1979 roll of goods.

He stated that it was rather difficult to accept the fact that the exhibit was 1979 goods. He further stated that he was astonished that Exhibit 39 looks as good as it does. He reiterated this on many occasions even though there was a lot number and date verifying the fact.

Regardless he stated that the nylon contracted due to aging. He also stated that there was a bad machinery setup.

His opinion was first aging, secondly humidity and aging; thirdly, the start-up process and finally the Hooper theory with reference to exhibit FGG (1-4) is a letter dated September 28, 1979 to John McElroy from A.L. Hooper of S.D. Warren a Division of Scott after a visit to plaintiff's plant. Excerpts from said report are.

> I have developed some opinions on your production problems from both the data and the visit. They are as follows:
>
> Two problems exist as I see it.
>
> a. Tensions on the fabric are excessively high during the tie coating operation. The fabric may be stretched during the coating operation and then bound by the coating which is dried on the stretched fabric. This effect would cause a loss in width and a gain in length. The dry tie coating as well as tension, holds the fabric in this distorted situation. Exposure to high humidity or steam weakens the coating's strength allowing the fabric to shrink in the machine direction. Cross direction expansion probably also takes place at the same time. This problem may also be caused in the finishing operation, however, the date available indicates this present problem is caused in the tie coater operation.

Isolating the tension in the tie coat section and lowering tensions in the ovens may solve this problem.

With the previously mentioned problem neutralized, MD shrinkage should be lessened or eliminated and part of the CD growth eliminated.

b. Lamination of dry nylon to a more moist and dimensionally stable release liner is probably causing MD welts. This problem is typical of lamination operations which laminate substrates having different moisture levels. The nylon grows nearly 3 times as much as the release liner when they start at the same RH.

This explains the immediate MD welt problem off the coater, on the outside wrap of rolls, as well as the problem of welts after sheeting when subjected to high % RH. Even being in contact with higher % RH release liner in the roll form could, given the time, cause moisture welts.

Adding moisture to the nylon during tie coating and adhesive coating operations should help the % RH problem. Moving lamination further away from the adhesive oven exit would allow remoisturizing with additional time for expansion in fabric width before lamination. Steam may be more effective for remoisturizing as the nylon doesn't appear to readily accept moisture in the liquid form. By carefully controlling both tension and moisture on your coaters, CD tunnels and MD welts should be less of a problem to you in the future.

Norwich stated that there was excessive tension in the machinery and no evidence that anything was wrong with the fabric. It was also his opinion that goods should not be left in a standing or upright condition.

The witness demonstrated by referring to exhibit 1 D, photograph taken in Ireland of rolls standing up.

Norwich also referred to Exhibit FJJ(1-2) a report dated March 11, 1983 from Robert R. Grant to Irving Brawer who was present on November 11, 12, 1982 at the Gonic, New Hampshire plant of Action observing the actual lamination of various nylon goods to paper. Grant was also present on December 17, 1982 when the rolls had to be taken to Albany International in Dedham, Massachusetts to be examined. Grant made the following observations.

I notice distortion on the product of the manufacturing processes previously observed on November 12, 1982. There were various degrees of distortion in the various pieces of merchandise. On the basis of my examination I have come to the definite conclusion that the cause of the distortions were due solely to the methods used in the tie coating, adhesive coating and laminating operation, and was in no way due to the nylon material. Briefly, my opinion is based upon the following:

(a) Tension in the goods which were uneven — resulting in ridges contributing to uneven coating.

(b) The coating was applied unevenly, resulting in uneven distribution of the tie coat and adhesive. This allows the product to usually appear satisfactory at the time of lamination, but would permit delamination and distortion of the product (blistering and separation of the nylon cloth from the paper) after a period of time. In further explanation, uneven coating would result in the retention of solvent in those areas having thicker coating. Such thicker coating would cause either some blistering in the oven or delamination after a period of time.

(c) Heat not properly controlled during processing would result in blistering, which was evidenced when the IX goods were being processed.

Norwich stated that exhibit 33 showed heat blisters because of excessive temperatures and exhibit 39 shows evidence of uneven coating.

In examination by Attorney Hafer reference was made to exhibit FXX(1-3), Fairhaven fabric and the witness stated that the delamination was not caused by the nylon. Referring to exhibits FYY and FZZ Schneider and Glen Raven fabrics the witness stated that the adhesive took a little while longer to break down, tunnels show excessive temperatures and the edge of the paper didn't have contact with the adhesive.

Referring to Exhibit DDD plaintiff's manufacturing specifications dated November 23, 1979 under special instructions is the following TENSION is critical.

Norwich also stated that the wormy patterns on exhibit 9 was caused by too much tension and adhesive problems not attributable to the fabric. Again, he stated that the testing of the 1979 Fairhaven fabric failure was due to aging of nylon and finish which affected modules.

In commenting on exhibit FFF the witness stated that it was an A 1 report, reasonable; nothing therein shows Fairhaven to be at fault. 15B was not a fair report, the 17.4 grams were due to aging. He did agree that Dupont has a high reputation for good nylon in the industry.

Moving to more specific findings of fact by the court this case was a complex trial taking nine days including one day involving a view of the plaintiff's manufacturing plant. There has been a plethora of paper which includes requests, memorandums, footnotes and post-trial memorandum filed with the court's approval of approximately seventy-seven pages.

The court finds that the credentials of the defendant's expert, Braham Norwich awesome, he is erudite, experienced to a high degree in textiles, not unduly modest, but in this case testimony is not very credible. The record amply records this, when one considers the astute cross-examination of plaintiff's counsel.

On the other side of the coin, the court in evaluating the testimony of plaintiff's principal expert, Adi B. Chehna, finds that his background is not as extensive as Mr. Norwich, but his testimony was very credible.

Succinctly the court in getting to the crux of the issue in this case finds that the material supplied by Fairhaven was defective.

The defendant warranted to the plaintiff that the nylon fabric was of first quality. RSA 382-A:2-313 (2). The court also finds that there was an implied warranty of fitness. RSA 382-A:2-314.

Irving Brawer admitted that all of the goods purchased by the plaintiff were first quality goods. The plaintiff was not aware of the involvement of the third-party defendant until Fairhaven brought a third party indemnification action. In this regard, the

court agrees with plaintiff's contention that RSA 382-A:2-607 is not apposite as to the allegation of lack of notice.

The plant trial test in 1982 used old and new Fairhaven goods, as well as Schneider and Ix's. The court has already made reference to this test. The court agrees with Mr. Chehna's conclusion that the cause of the problems was product failure.

Defendants contend and the expert Norwich testified that this was not a fair test as the old Fairhaven goods were over three years of age at the time of the test in November, 1982. Perfect identity between experimental and actual conditions is neither attainable or required. *Hanson v. Pre-Mix Concrete, Inc.*, 110 N.H. 377, 380 (1970). See *Ramseyer v. General Motors Corporation*, 417 F.2d 859, 864 (8th Cir. 1969).

> Admissibility of evidence depends upon a foundational showing of substantial similarity between the tests conducted and actual conditions. See, *Skosgen v. Dow Chemical Co.*, 375 F.2d 692, 704 (8th Cir. 1967); *Gillam v. J.C. Penney Co.*, 341 F.2d 457, 460 (7th Cir. 1965); *Larson v. Meyer*, 161 N.W. 2d 165 (N.D. 1968); *Crecelius v. Gamble-Skogmo, Inc.*, 144 Neb. 394, 397, 13 N.W.2d 627 (1944). Perfect identity between experimental and actual conditions is neither attainable nor required. *Lobel v. American Airlines*, 205 F.2d 927, 931 (2d Cir. 1953). Dissimilarities effect the weight of the evidence, not admissibility. See, *Lever Bros. Co. v. Atlas Assur. Co.*, 131 F.2d 770 (7th Cir. 1941). Finally, the decision whether to admit or exclude evidence of experiments in a particular case rests largely in the discretion of the trial judge and his decision will not be overturned on appeal absent a clear showing of an abuse of discretion. See, e.g., *Skogen v. Dow Chemical Co., supra; Ripp v. Riesland*, 180 Neb. 205, 141 N.W.2d 840 (1966); *Reizenstein v. State*, 165 Neb. 865, 87 N.W.2d 560 (1958); *Crecelius v. Gamble-Skogmo, Inc., supra.*

The court agrees with plaintiff's counsel's contention that the plant trial exhibit was the most probative evidence introduced at the trial.

Credible evidence was also introduced that fabrics from another supplier were used without untoward results.

The court finds that the plaintiff has sustained its burden of proof on the issue of liability by a balance of the probabilities. *Buffum v. Buffum*, 89 N.H. 210.

It is also fundamental that the plaintiff has the burden of proving its damages by a preponderance of the evidence. The plaintiff also has the duty to mitigate damages. *Murray v. Boston Main RR*, 107 N.H. 367.

> Any undertaking to establish the amount of future gains prevented is likely to encounter difficulty in satisfying the requirement of reasonable certainty of proof. Restatement of Contracts, s. 331 and Comments (1932); *Salinger v. Salinger*, 69 N.H. 589, 591, 45 A. 558, 559 (1899). An established business can usually provide data from which future prospects can reasonably be projected. *Buck v. Mueller*, 221 Or. 271, 351 P.2d 61 (1960). Where operations have never commenced, evidence of expected profits has generally been considered incompetent because speculative. 22 Am. Jur. 2d Damages s. 173 (1965).
>
> The difficulty of determining the sum which will recompense a person for the wrongful act or omission of another is not ordinarily regarded as a sufficient reason for not allowing the injured party any damages." *Lee v. Dow*, 71 N.H. 326, 327, 51 A. 1072, 1073 (1902). "By the weight of authority, and what we believe to be the better view, uncertainty as to the amount is no reason for disallowing [recovery] when the uncertainty is caused by the defendant's unexcused breach of the agreement." *McLaughlin v. Union-Leader*, 100 N.H. 367, 369, 127 A.2d 269, 271-72 (1956); see 5 Williston, Contracts, ss. 1345, 1346 (rev. ed. 1937); 5 Corbin, Contracts s. 1022, at 139, 1433-45 (1964).

Van Hookjdonk v. Langley, 111 N.H. 32, 34, 35 (1971).

The plaintiff has made a claim relative to transportation of defective goods to European countries. More accurately the expense of return shipments from Ireland. The sum of $2,457.81 is a recoverable expense.

Next, the plaintiff seeks recovery for storage of the defective goods. The goods were initially stored nearby in a rented facility, a

short distance from its Gonic, New Hampshire plant. Other material was also stored in the same warehouse. The pro-rata cost of $75.00 a month for a period of 45 months, totalling $4,375.00 a month, the court finds to be reasonable and fair.

Due to the return of the defective goods the plaintiff had to ship replacement goods by air freight. The total cost of $2,653.43 is recoverable by the plaintiff.

It is the court's finding that the plaintiff has met its burden of proof of establishing that the material cost represented by the remaining inventory of defective goods produced from defendant's fabric was the sum of $38,622.40.

The sum of $9,012.00 with respect to the loss on salvage sales of defective goods is also allowed as an element of damages.

The court now addresses the claim of the plaintiff for lost profits. *Van Hookjdonk v. Langley, supra.*

"In the case of a breach of contract, the goal of compensation is not the mere restoration to a former position, as in tort, but the awarding of a sum which is the equivalent of performance of the bargain — the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled." C. McCormack, Law of Damages § 137, at 560-61 (1935). *Emery v. Caledonia Sand & Gravel Co.*, 117 N.H. 441, 447.

Damages for lost profits for the year 1980 in the sum of $86,669.97 are awarded.

The plaintiff has failed to meet its burden of proof for lost profits in the year 1981.

The plaintiff is entitled to a total judgment against the defendant in the sum of $142,790.26.

It has been agreed that Fairhaven in its counterclaim is entitled to recover the sum of $33,543.92.

Finally, the court addresses the issue of Fairhaven's requests for findings of fact and ruling of law not in a mordant or caustic manner, but hopefully in a remedial sense.

The problem presented is not one of first impression, neither is it one which the court has not encountered before, and in all probability will be faced with again in the future.

In refusing to rule on these requests, the court has made comprehensive rulings of its own in this forty-three page opinion.

Before ruling on Fairhaven's requests for findings of fact and rulings of law which at first blush, appear quite reasonable in number, i.e. 37, a circumspect examination discloses that the ploy of incorporating four or as many as seventy-six requests in one is prevalent throughout. For example, request number 1 actually has 5 requests incorporated therein; Request #15, 7; request #23 no less than 70, more accurately 76. At this point the court has stopped counting. In addition by not specifying exactly, succinctly, pristinely and concisely some of the requests are correct, others are not, some necessitate a judge requiring a mnemonic, or a photographic memory.

Counsel's attention is directed to *Concord General Mutual Insurance Co. v. Haynes*, 110 N.H. 76, 79 (1969) concerning requests.

> There are some ambiguities in the findings, and the number and form of the requests submitted by the parties here invited ambiguity. The trial Court made rather brief findings of his own and then stated: "Further recital is unnecessary, as the Court has answered the ninety-six requests submitted by counsel." This mild comment understated the number of requests and complexity of the task counsel imposed upon the Court. Concord in many cases included a half dozen or more requests under a single number. They included requests to find what parties claimed in their testimony and to make hypothetical rulings of law. The procedure employed here was contrary to the design of RSA 491:15 which "was to provide a simple and expeditious method of presenting to the law court the questions of law arising on the facts proven, as distinguished from the evidence." *Tilton v. Sharpe*, 84 N.H. 393, 396, 151 A. 452; *Gowen v. Swain*, 90 N.H. 383, 385, 10 A.2d 249.

Reference is also made to *R.J. Berke & Co. v. J.P. Griffin*, 116 N.H. 760 (1976) and the following comment at page 762.

> The proceedings, heard by a Judicial Referee (Blandin, J.), were lengthy resulting in a voluminous record and many exhibits. The parties showed little inclination to reduce this complexity or to assist the trial court. The parties ignored the design of RSA 491:15 as succinctly set forth in *Concord General Mutual Insurance Company v. Haynes*, 110 N.H. 76, 79, 260 A.2d 99, 101 (1969), and the plaintiff filed 177 requests for findings and rulings and the defendant 993 such requests.

Reference is also made to Rule 52(a) R.F.C.P. regarding requests and the following commentary.

> Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review, *Hurwitz v. Hurwitz*, 1943, 136 F.2d 796, 78 U.S. App. D.C. 66, but they are an important factor in the proper application of the doctrines of res judicata and estoppel of Fact and Conclusions of Law, 1 F.R.D. 25, 26-27. *United States v. Forness*, C.A.A. 2, 1942, 125 F.2d 928, certiorari denied 62 C. Ct. 1293, 316 U.S. 694, 86 L. Ed. 1764. These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. *United States v. Forness, supra; United States v. Crescent Amusement Co.*, 1944, 1945, 65 S. Ct. 254, 323 U.S. 173, 89 L. Ed. 160. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. *Matton Oil Transfer Corp. v. The Dynamic supra.* But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts. *United States v. Forness, supra.* See also *Petterson Lighterage & Towing Corp. v. New York Central R. Co.*, C.C.A. 2d, 1942, 126 F.2d 992; *Brown Paper Mill Co., Inc. v. Irwin*, C.C.A. 8, 1943, 134 F.2d 337; *Allen Bradley Co. v. Local Union No. 3, I.B.E.W.*, C.C.A. 2, 1944, 145 F.2d 215, reversed on other grounds 65 S. Ct. 1533, 325

U.S. 797; *Young v. Murphy*, Ohio 1946, 9 Fed. Rules Serv. 52 a. 11, Case 2.

September 29, 1983

Martin F. Loughlin
U.S. District Judge

Alan Ponn, Esq.
Peter Karl Marsh, Esq.
Edward A. Haffer, Esq.
Irving C. Brawer, Esq.
James J. Barry, Jr., Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1429

ACTION MANUFACTURING, INC.
Plaintiff, Appellee

v.

FAIRHAVEN TEXTILE CORPORATION
Defendant, Appellant

Verified Petition for Rehearing En Banc

WM. S. GREEN
JAMES E. HIGGINS
EDWARD A. HAFFER
SHEEHAN, PHINNEY, BASS & GREEN
PROFESSIONAL ASSOCIATION
1000 Elm Street
Manchester, New Hampshire 03301
(603) 668-0300

Respectfully, we submit that the Court, in its severe censure and fine of Fairhaven's counsel, has grievously misapprehended facts. Because of the reputation-shattering effect of this terrible mistake, we respectfully request a rehearing before the Court en banc. Contrary to what the Court apprehended from oral argument, Fairhaven's Answer was correct when made and *is correct even now,* and its Pretrial Statement was correct when made and *is correct even now.* Though the point was not made in oral argument, when Fairhaven said in its Pretrial Statement, "All other facts are contested," the issue on notice was joined, and its duty of disclosure to Action was discharged. If Action did not understand that point, then it did not understand its own burden of proof. In light of these critical facts, we respectfully submit that the Court's opinion is mistaken — and given the consequences, tragically mistaken. Because of the resulting irreparable damage to reputation, we respectfully request that, pending a decision on the Petition itself, the Court immediately counteract any steps it may have taken to give the Opinion wide circulation. Explanations follow.

The governing law is RSA 382-A:2-607(3)(a) (a New Hampshire UCC provision), which provides, "Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." We describe below how this Section operates in this case.

An enlarged statement of the facts appears at pages 1-4 of Fairhaven's original brief. Set out here are the pleadings that are at the root of the Court's misapprehension. Full context being vital, here are paragraphs 7-11 of the Complaint (A. at 10) and the corresponding paragraphs of the Answer (A. at 14):

> 7. Pursuant to the contract and agreement set forth in paragraph 6 above, Plaintiff prepared in New Hampshire and submitted to Defendant numerous purchase orders for 70 and 200 denure [*sic*] nylon. Defendant accepted the purchase orders, proceeded to procure the goods and have them finished, whereupon they were shipped at various times and from various locations to Plaintiff's plant in Rochester, New

Hampshire. Plaintiff was billed by Defendant for the goods subsequent to their arrival in New Hampshire.

7. Admitted.

* * *

8. During the summer and early fall of 1979, pursuant to the contract and agreements set forth above, Defendant sold 70 and 200 denure [*sic*] nylon to Plaintiff which was defective and not fit and suitable for the purpose and use for which it was intended. Plaintiff was unable, even with reasonable inspection, to discover the defects in the goods before they had been processed and sold to customers in the United States and Europe.

8. Denied.

* * *

9. Subsequent to the processing and sale of these defective goods, Plaintiff received complaints and notices from customers that the goods were defective and could not be used for their intended purpose.

9. Without sufficient knowledge.

* * *

10. Because of these complaints, Plaintiff commenced to investigate the problem since it did not at that time know the cause of the defect. As a result of that investigation, Plaintiff determined that the cause of the defect was the defective nylon fabric which had been shipped to Plaintiff by the Defendant. Said nylon was not fit for its intended use.

10. As to any investigation, without sufficient knowledge. As to the nylon being defective or unfit, denied.

* * *

11. Immediately upon discovery of said defects in the nylon, Plaintiff notifed Defendant and requested that Defendant remedy the situation and compensate Plaintiff for the losses which it sustained as a result of said defective material. Although Defendant's agent came to Plaintiff's plant and personally inspected the said defective goods, Defendant has refused to remedy the situation.

11. As to any defects, denied. As to notification of a problem, admitted. As to Defendant's agent coming to Plaintiff's plant to inspect goods, admitted.

Fairhaven's admission on notice in paragraph 11 was correct when made and *is correct even now*. The following paraphrase of paragraphs 8-11 of the Complaint helps make the point plain:

1. "During the summer and early fall of 1979," Plaintiff bought defective nylon from Defendant.
2. After the purchase, Plaintiff processed it.
3. After the processing, Plaintiff sold it to customers.
4. After the sales, customers complained.
5. After the complaints, Plaintiff investigated.
6. As a result of the investigation, Plaintiff discovered that Defendant's nylon was, allegedly, defective.
7. Immediately upon discovery of "said defects," Plaintiff notified Defendant.

Under the Complaint and Answer, therefore, the "said defects" concerned those items which (1) Defendant had sold to Plaintiff "[d]uring the summer and early fall of 1979," and (2) had been the subject of Plaintiff's later investigation. The evidence was that these items were sold to Action in July and September 1979 (A. at 476-78), and that Action discovered the alleged defects in them on or about September 17, 1979. (T. 2 at 50, 96; T. 3 at 107-08.) Defendant admitted receiving timely notice on these *September* items, and without any equivocation whatsoever *still admits* receiving timely notice on the *September* items. As we explain below, however, under Section 2-607 (a)(3), the timely notice on these items became immaterial when it was later revealed that there had been a failure of notice on earlier, *June* items. (T. 3 at 158-72; A. at 260 and 292.)

In the simplest form, the sequence of events leading to litigation was as follows. In early June 1979, Action discovered problems with Fairhaven items that had been purchased before June (the "June items"); on these, it never gave Fairhaven notice. In September 1979, it discovered problems with Fairhaven items that had been purchased in July and September (the "September items"); on these, it gave Fairhaven timely notice. By operation of Section 2-607(3)(a), despite the timely notice on the *September* items, Action would be barred from *any* remedy, because it had not given timely notice on the earlier, *June* items. The rationale is that if Action had given timely notice on the June items — whether or not it later claimed damages on them — Fairhaven could have

then taken steps to avert any later problem. See pages 4-14 of Fairhaven's original brief.

As for the sequence of events during litigation, for the first 2-3/4 years of the case, notice was not an issue. However, just 2 months before Pretrial Statements were filed, *Action* made it one. It did so by answering an interrogatory on how it calculated its damages. (T. 3 at 162-72.) Action answered that it had suffered losses in June 1979, when customers began returning Action products made with Fairhaven nylon. Never before had the June items been disclosed to Fairhaven, despite extensive discovery. In raising the issue of June items, Action necessarily raised also the issue of notice on the June items. *Neither* had been raised in its Complaint. Action's answer to interrogatory therefore put all parties on notice that notice had now become an issue.

The misapprehension of Fairhaven's Pretrial Statement follows from the misapprehension of its Answer. By the time the Pretrial Statement was filed, the uncontested fact of timely notice on the *September* items had become immaterial. What had become material instead — specifically in terms of the bar against "any" remedy under Section 2-607 (a)(3) — was whether Action had in fact given timely notice on the *June* items. If it had not, it would then be barred from "any" remedy, despite the uncontested fact of timely notice on the September items. In its Pretrial Statement under "Uncontested Facts" (A. at 26-27), Fairhaven summarized the essence of the material facts it believed uncontested; it said nothing about timeliness of notice because that was a fact it was going to contest. Under "Contested Facts" (A. at 28), it said, *"All other facts are contested."* (Emphasis added.) With that statement, the issue on notice was joined, and Fairhaven's duty of disclosure to Action was discharged. If Action did not understand that point, then it did not understand its own burden of proof.

Fairhaven did not specifically tell Action that its own answer to interrogatory on damages had made notice an issue. Its legal reason was that it had no duty to do so. *"Notification* under sec-

tion 2-607 is an integral part of a buyer's cause of action and *is not an affirmative defense of the seller.* Therefore, *the buyer must both plead and prove that the notice requirement has been complied with." Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 970 n.5 (5th Cir. 1976) (*emphasis added*). *Royal Typewriter Co. v. Xerographic Supplies*, 719 F.2d 1092, 1102 (11th Cir. 1983); *K & M Joint Venture v. Smith International, Inc.*, 669 F.2d 1106, 1111 (6th Cir. 1982); *Standard Alliance Ind. v. Black Clawson Co.*, 587 F.2d 813, 823 (6th Cir. 1978) cert. denied, 441 U.S. 923 (1979). Here, therefore, the burden of proof was on Action, not Fairhaven. If Action did not understand its burden — in particular, its burden of proving timely notice on the June items — Fairhaven should not be punished for it. And under no circumstances should Fairhaven's counsel be excoriated and fined.

It is inconceivable, moreover, that Action — having itself gone outside its Complaint to raise the issue of the June items, and necessarily to raise also the issue of notice on the June items — could have been unfairly prejudiced by being met with them at trial. Fed. R. Civ. P. 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Having itself raised the June issues, Action could not have fairly objected to them at trial. As it was, it made no objection anyway.

It did not object to the evidence showing June discovery (T. 3 at 158-72), nor to the closing argument of Fairhaven's counsel on the legal significance of that evidence (T. 8 at 132-37). Nor did it request a continuance to meet that evidence. *Indeed, most stunningly of all, Action itself put into evidence a list of June credits to customers on the June items.* (Compare A. at 260 and 292, and see T. 3 at 158-61, all set out in the Appendix at the rear of this Petition.) The fact that in mid-trial Action professed to "reconceptualize" (T. 3 at 304) its claim for damages, dropping the claim on the credits, does not negate the operation of Section 2-607(a)(3). Our statement from page 5 bears repeating here: "By operation of Section 2-607(a)(3), despite the timely notice on the *September* items, Action would be barred from *any* remedy, because it had never given notice on the earlier, *June* items. The rationale is that if Action had given timely notice on the June items — whether or not it later claimed damages on them — Fairhaven could have then taken steps to avert any later problem. See pages 4-14 of Fairhaven's original brief." Again, if Action did not appreciate the full import of Section 2-607(a)(3) and, therefore, did not understand its own burden of proof, Fairhaven should not be punished for it, and its counsel should not be humiliated.

In suggesting on page 4 of its Opinion that Fairhaven had "conceded" timely notice on the *June* items, the Court is mistaken. Fairhaven *never* did. Its only concession concerned the *September* items, the *only* ones covered by the Complaint. To repeat, so that there is absolutely no mistake about it: Fairhaven admitted and continues to admit that as a matter of *fact* it received timely notice on the *September* items; however, as a matter of *law* under Section 2-607(a)(3), the timely notice on these items became immaterial when it was later revealed that there had been a failure of notice on the *June* items. Again, see pages 4-14 of Fairhaven's original brief.

Likewise, the Court is mistaken on page 4 in suggesting that Fairhaven attempted after the close of the case (or at any other time) to withdraw its admission to paragraph 11 of the Complaint. Here is what Fairhaven's counsel argued to the trial court:

Without going into the details of the interrogatories read into the record, but it's there and I'll assure the Court that it's there [see T. 3 at 162-72], we found out that Action claims in answers to interrogatories read into the record that its losses it actually calculated from June of 1979, not September of 1979, after which it gave notice. And I believe Mr. Brawer indicated the only evidence on relatively precise date of notice was sometime in October or November that Fairhaven was told there was a problem.

But the answers to Fairhaven's interrogatories read into the record indicates that Fairhaven — or that Action, rather, had customers return goods in June of 1979, not September. In June of 1979. And it indicated that for Blue Ribbon Sports, for Dori Shoes and for the Oncor [*sic*] Shoe Corporation. June of 1979 was when customers started returning the defective products.

And that meshes perfectly with Exhibit FU. Exhibit FU is the list of credits that Action now disavows any interest in terms of damages. That's fine. That's beside the point.

Exhibit FU is still significant, because it shows that, in conjunction with the testimony of Mr. Gaffney, that these were the credits that Action issued to customers upon the return of goods that were defectively made with Fairhaven products. That is emphatically the state of the record.

And if that is so, and indeed it is so, it's uncontroverted, there was an obligation under RSA 382-A:2-607(3) to give reasonable notice of those returned goods for which credits have been given and for which Action said the defect was caused by Fairhaven. No such notice was given.

Some time after September 17th notice is given. And Exhibit FU shows that there were I believe eight credits issued in June, the earliest of which was June 6, 1979. There were also credits on June 7, 1979 to Jaeger.

No notice. Fairhaven is led down the primrose path. I don't known whether the foot bone wasn't connected to the head bone in Action or what, but there was *no notice sent to Fairhaven until some time after September 17, 1979.*

What happens between June and September 17, 1979? First, no notice.

Second, Action buys on July 24, 1979 and September 10, 1979, September 13, 1979, 202,000 yards of Fairhaven products. [T. 8 at 134-36 (emphasis added).]

At pages 4-5 of its Opinion, the Court says, "During oral argument a colloquy revealed that, prior to the pretrial statement of issues, defendant had discovered grounds for claiming that its admission in its answer was incorrect, but had concluded to remain silent. Asked why, counsel said,

> "[W]e had a reason for not tipping our hand."
>
> Court. "You wanted to fool the court?"
>
> Counsel. "No, we did not. We did not want to be fooled by the [plaintiff.]"

The Court's description does not have counsel *saying* that the admission in Fairhaven's Answer was incorrect, and counsel does not know what he actually said. See the accompanying Motion to Hear Tape. If he said what the Court describes, he was wrong. See pages 2-5 and 10-11 of this Petition. Counsel answered the Court's questions extemporaneously. He had not examined Fairhaven's Answer of Pretrial Statement either in preparation for argument or during it. Though his preparation on the law and the voluminous exhibits and transcripts had been extensive, he had not in his wildest imagination anticipated any question on the Answer, then 5 years old, or the Pretrial Statement, then 2½ years old. Counsel profoundly regrets that his oral argument contributed to the misapprehension of both. However, the *fact* remains that both the Answer and the Pretrial Statement were correct when made and are correct even now.

Fairhaven's reason for not "tipping its hand" to Action — i.e., not specifically telling Action that its own answer to interrogatory on damages had made notice an issue — was part legal and part factual. The legal part was that it had no duty to do so. See pages 6-7 of this Petition. The factual part was distrust. Obviously, if there had been a legal duty, distrust would have been no excuse for nonperformance. Here, however, no duty existed: Action, not Fairhaven, had injected the notice issue into the case by claiming damages on the June items, of which Fairhaven had had no prior knowledge; Action, not Fairhaven, had the burden of proof on this injected issue; and Fairhaven had joined the issue by the "Con-

tested Facts" statement of its Pretrial Statement — itself a complete tip of the hand to an opponent that understood its own burden of proof. Though the distrust had many elements (see Fairhaven's original and reply briefs), the heart of it was that Action's president had submitted false evidence in prior litigation. Put in evidence at trial was a 1979 Report of the Master of the Suffolk County (Mass.) Superior Court in an action brought against the president by his former employer (A. at 373-448; T. 3 at 90-95). The Master found among other things that the president had: (1) *caused a false invoice to be placed in evidence, unbeknownst to his counsel*; (2) directed the payment of bribes or kickbacks; (3) lied to his former employer; (4) given completely incredible testimony; and (5) committed at least thirteen separate breaches of fiduciary duty. Fairhaven's counsel feared falsification again; and having no duty to school Action on the implications of *its* damages claims or *its* burden of proof, he honored his duty, completely within the law and in conflict with no other, to protect his *own* client against an opponent with such a past.

Even if the Court disagrees with the merits of counsel's legal arguments, he has discharged all his duties in absolute good faith and with close attention to what he believes to be the law. The stinging rebuke and public humiliation inflicted on him is, therefore, as mystifying as it is painful.

It is worth noting that the Trial Court, who saw and heard all the evidence and all the arguments, closed the trial saying:

> I'd just like to make one comment before I leave the bench. And I'm sorry Mr. Brawer isn't here.
>
> And that is, that I commented during the trial in chambers to my personnel that this case has been very well tried by all parties. Counsel did a lot of work and it's a very intricate, difficult case to decide, you know that, but you made it a lot easier by the way you presented it and the time you put into it, the exhibits, the way everything went in, and you're to be commended.
>
> And I'm sorry Mr. Brawer isn't here to hear what I have to say. And maybe you could get that part of the record for him. [T. 8 at 166-67.]

If allowed to stand, the effect of the mistake in the Appellate Court's Opinion would be ravaging. Terrible damage has already been inflicted. With every respect, we request that:

1. pending a decision on the Petition itself, and because of irreparable damage to reputation, the Court immediately counteract any steps it may have taken to give the Opinion wide circulation;

2. pending a decision on the Petition itself, and because of irreparable damage to reputation, the Court withdraw the Opinion;

3. the Court grant a rehearing en banc on the characterization of counsel;

4. the Court grant a rehearing en banc on the notice issue, and on any other issue the Court might see fit to hear; and

5. the Court grant such further relief as it deems just.

Respectfully submitted,

Dated: March 4, 1986

Wm. S. Green
James E. Higgins
Edward A. Haffer

Sheehan, Phinney, Bass & Green
Professional Association
1000 Elm Street
Manchester, NH 03101
(603) 668-0300

I, Edward A. Haffer, affirm under oath that the facts stated in this Verified Petition are true to the best of my knowledge and belief.

Edward A. Haffer

Subscribed and sworn to before me this 4th day of March, 1986.

_____

Justice of the Peace

CERTIFICATE OF SERVICE

I hereby certify that two copies of this Verified Petition have been sent to Peter Karl Marsh, Esq., Irving Brawer, Esq., and James J. Barry, Jr., Esq.

_____

Wm. S. Green

☆ Exhibits omitted.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1429.

ACTION MANUFACTURING, INC.,
Plaintiff, Appellee,

v.

FAIRHAVEN TEXTILE CORPORATION,
Defendant, Appellant.

ORDER OF COURT

Entered: March 7, 1986

Before writing the opinion the court had transcribed the portion of the tape relevant to the present question. A copy of this transcription is hereto attached. This has been re-checked against the tape, and there are few, very slight, but entirely inconsequential errors. The court does not normally make tapes available, but will do so in this case on further request.

By the Court:

FRANCIS P. SCIGLIANO,
CLERK.

[cc: Messrs. Haffer and Marsh.]

H. From Fairhaven's view there are two simple but key points. One as a matter of law Action not give timely notice is therefore barred under section 2-607 of the UCC.

BA. I didn't see any evidence addressed to that point. Was there?

H. Yes, your honor, there was. In the first place there was evidence that initially Action had claimed to have discovered the defects on September 17, 1979 and that after that it said it had notified Fairhaven. Later, and when this evidence was introduced at trial, two and half years later in the course of discovery it was revealed that Action had actually discovered there were defects in the products in June of 1979 and that it gave customers credits for those defects involving some 2,000 yards and some $3500 dollars. That evidence was put in at trial showing that as early as June and not September as Action had originally alleged as early as June Action was aware that there were defects in its products.

BA. Where in your pretrial statement did you raise that point?

H. We did not specifically raise it your honor.

BA. Not only did you not specifically but the answer says just the opposite — that you admit due notification. You might have changed your mind from the time that you answered. But you certainly didn't change it on the pretrial memorandum that was before the court.

H. Your honor, I believe in the answer to the complaint we denied any defects and further the point is, your honor—

BA. I'm sorry perhaps this bothers me too much but it does. Paragraph 11 of the complaint "immediately upon discovery of said defects in the nylon plaintiff notified defendant that etc." Answer to paragraph 11, "as to any defects, denied; as to notification of the problem admitted.

H. At that point we did admit it —

BA. Ok, then you didn't change it and that's where we went back to where I started, you didn't put it in the pretrial memorandum that you had changed it.

H. It was a matter of evidence before the court and we discovered that —

BA. I'm not interested in a review in court as to what the evidence was until I see what the court thought what the evidence was, and related to, and the court thinks about a pretrial memorandum.

H. Your honor, we put in — we discovered 2½ years after we filed that answer —

BA. After you filed the pretrial memorandum?

H. No your honor, before that.

BA. That was the time, wasn't it?

H. Yes your honor, we did discover, —

BA. All right, go on to your next point.

H. All right your honor —

BA. As far I'm concerned you're dead on this one.

H. Well, if I may, part of the reason for the evidence that was put in, it was shown that in June of 1979. —

BA. So it was, but the court looks at a pretrial memorandum. I've sat on the district court off and on for 30 years and I shall continue to do it that same way and so do all district judges.

H. Your honor, we submit the court should make its decision on the basis of the evidence and there was evidence put —

BA. On the basis of the evidence and the *issues presented* that that evidence relates to. [Emphasis supplied in the Court's transcript.]

H. Your honor, the matter of notice is a matter of burden of proof on the plaintiff —

BA. It is if you raise it! Now let's move on.

H. Well, your honor, if I may, I respectfully differ with Judge Aldrich on that point —

BA. I understand you —

H. But it is a key point. We put in evidence which we discovered 2½ years after we filed the answer that the defects in Fairhaven's goods were discovered in June and not September as we had originally —

FC. Why wasn't this, if the pretrial memo was filed after that why didn't the pretrial memo say something? Instead of saying apparently that you admitted due notification.

BA. That was in the answer.

H. That was not in the pretrial memo.

BA. The pretrial memorandum stated what the issue would be and said nothing about this issue.

H. It did not —*

BA. I read them with some care.

H. It did not specify notice, your honor, that is correct.

BA. All right, that's the case you tried and that is the case that is before us.

H. And if I may, we had a reason for not tipping our hand before that; one, we —

BA. You wanted to fool the court?

H. No, we did not. We did not want to be fooled by the plaintiff, because we also put into evidence that the president of Action —

BA. In other words, you wanted to fool the plaintiff by telling him the issue was X and then fool him and come around and say haha, it was Y.

H. No, your honor, we did not. We were deceived from the start when we were told that notice had occurred to, to, that discovery had been made by Action in September. 2½ years after we gave our answer admitting that we discovered through extensive document discovery which we had to make repeatedly that they had actually discovered the defects in June. At trial, as a matter of fact, in cross examination, we uncovered evidence which had not been presented to us in discovery that they had discovered the defects the previous March. There was a pettern of deceit in Action's —

FC. Your time is running out ....

---

* Although the Court's transcription of the tape put a period here instead of a dash, the tape itself, which counsel was permitted to copy after receiving the transcription, shows that counsel had not completed his sentence. He completed it in the next entry shown for him.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1961

ACTION MANUFACTURING, INC.
Plaintiff, Appellee,

v.

FAIRHAVEN TEXTILE CORPORATION
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF OF DEFENDANT, APPELLANT

* * *

Argument

I. ACTION'S CLAIM IS BARRED BECAUSE ACTION DID NOT GIVE TIMELY NOTICE OF THE ALLEGED BREACH.

Action says that it did not become aware of the latent defect in its products until *September 17*, 1979; that on the same date it began an investigation; that "[a]s a result of the investigation" it determined that the cause of the defect was, allegedly, an underlying defect in Fairhaven's fabric; and that on making that determination it notified Fairhaven. Fairhaven received the notice in October or November 1979. Yet beginning on *June 6*, 1979 — more than 3 months before September 17 — Action was giving credits to customers who were returning defective Action products allegedly made from Fairhaven fabric. (A. at 292; T. 3 at 164-

72.) It was in early June, therefore, that Action discovered the defects or should have discovered them.

Indeed, it is possible to date Action's discovery (actual or imputable) to as early as *March* 1979, 6 months before September 17. During cross-examination at trial, Mr. Gaffney, Jr., Action's plant engineer and the son of Action's president, produced his notes and testified to the following excerpt from them: "Need original spec. for 170 w/1 [70 denier fabric] in use during period *March* through November 1979. *This was the period we had bad production using Fairhaven.*" (T. 6 at 117-18 [*emphasis added*].)

Whether March or June, however, the legal effect is one and the same: the post-September 17 notice was fatally late. RSA 382-A:2-607(3)[3] provides in relevant part: "Where a tender has been accepted . . . *the buyer must within the reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . .*" [*Emphasis added.*] Moreover, for a merchant buyer, like Action, the time for notifying is sooner than it is for a consumer buyer. Comment 4 to Section 2-607 provides:

> The *time* of notification is to be determined by applying *commercial standards* to a *merchant buyer*. "A reasonable time" for notification from a *retail consumer* is to be judged by *different standards* so that in his case it will be extended, *for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.*
>
> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer. . . . Nor is there a reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which

[3] RSA 382-A is the Uniform Commercial Code. Unless stated otherwise, all further statutory references will be to that chapter but will cite only the sections — e.g., Section 2-316, rather than RSA 382-A:2-316.

> saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation. [*Emphasis added.*]

The first paragraph of the Comment, stressing particularly prompt notice by a merchant buyer, is consistent with Section 2-103(1)(b), which provides, " 'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." See also Section 1-203, which imposes an obligation of good faith in the performance of every duty. See also Comment 19 to Section 1-201.

"An action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time period." Section 1-204(3). Action and Fairhaven agreed, indeed repeatedly agreed, that ten days was the time within which notice of defects had to be given. Placed in evidence were all the invoices sent by Fairhaven to Action. (A. at 315-56.) Each and every one of them accompanied a delivery of Fairhaven goods; and each and every one of them had at its very bottom, beneath inches of white space, the following: "NOTICE: Any dispute or claim on this merchandise must be made in writing within ten working days after receipt of this invoice which represents a contract therefor, and no claims or allowances for such goods shall be made after they have been cut or processed." Fairhaven does not argue that this provision should be enforced literally in every particular. To do so, e.g., with goods alleged to have had defects that were latent would be "manifestly unreasonable," and thus unenforceable under Section 1-204(1). Rather, Fairhaven asserts that once Action became aware of a problem — specifically, a problem alleged to have been originally latent — it *then* had ten days to notify Fairhaven. So applied, the ten-day provision promotes commercially reasonable diligence and good faith.

The notice requirement of Section 2-607(3) is both sensible and fair. Consider the facts here in the simplest form: Buyer buys fabric from Seller; Buyer coats it and then sells it; when sold, the

coated product has latent defects; Buyer's customers start returning the coated product because its latent defects have become patent; Buyer gives credits to the customers; Buyer says nothing about this trouble to Seller; time passes; Buyer actually increases its orders from Seller — indeed, greatly increases them; after ordering much more fabric and after receiving much more customer complaint, Buyer finally claims to Seller that the fabric is defective. To say that Seller has been caught unawares is understatement. More aptly described, Seller has been hit blind side. While the damages were growing and growing, Seller — unlike Buyer — did not even know that there had been any damage in the first place. Seller was never given a chance either to investigate the trouble or to cap its exposure, e.g., by simply ending sales to Buyer. Part of the wisdom of Section 2-607(3) is that it shields Seller from such blind side hits. Sensibly and fairly, and wisely, it requires Buyer to give prompt notice of the trouble. If Buyer does not, the trouble is then its own responsibility. It is barred from blaming Seller. See p. 9 hereof, discussing causation.

Consider next the facts in their numerical detail. Specifically, note closely Exhibit FU (an Action business record, A. at 292) and Exhibit FWW20-22 (an affidavit of Mr. Gaffney, Sr., Action's president, A. at 476-78). Compilations from those exhibits show the following:

YARDADE RETURNED
(Exh. FU)

1. Yardage Returned from Customers to Action for Month of June 1979 (beginning June 7, 1979 and ending June 27, 1979)	2,080 linear yards of 45-inch-wide fabric (which equals 2,601 square yards of fabric)
2. Yardage Returned from Customers to Action After June 1979 (beginning September 17, 1979 and ending January 31, 1981)	16,090 linear yards of 45-inch-wide fabric (which equals 20,112 square yards of fabric)

3. Total Yardage Returned (1 + 2)	18,170 linear yards of 45-inch-wide fabric (which equals 22,713 square yards of fabric)

* * *

CREDITS
(Exh. FU)

1. Credits on Returned Yardage for Month of June 1979 (beginning June 7, 1979 and ending June 27, 1979)	$3,514.31
2. Credits on Returned Yardage for Time after June 1979 (beginning September 17, 1979 and ending January 31, 1981)	$26,974.59
3. Total Credits on Returned Yardage (1+2)	$30,488.90

* * *

YARDAGE ORDERED
(Exh. FWW 20-22)

Yardage Ordered by Action from Fairhaven after June returns and credits but before September 17, 1979	202,000 linear yards

Thus, roughly *10%* of all the returns and credits occurred in June 1979 (between the 6th and 27th), and involved *2,080* linear yards. The latent defects had by then become patent, and in amounts certainly big enough to warrant Action's attention (yet also small enough to be inexpensively corrected). However, ignoring the law, Action gave Fairhaven no notice of this trouble. To the contrary,

its next significant approaches to Fairhaven suggested enormous satisfaction: in July and early September, Action ordered from Fairhaven another *202,000* linear yards. Action's failure to give notice was bad enough; but to compound that failure by geometrically increasing Fairhaven's exposure was outrageous. It was conduct for which the law has no tolerance. Section 2-607(3), to repeat, shields a seller from such blind side hits. It tells the buyer: give your seller prompt notice of the trouble, or be barred from blaming him at all.

That message, moveover, accords perfectly with the UCC law on intervening cause: "Of course *if the buyer discovers the defect and uses the goods anyway*, or if he unreasonably fails to examine the goods before he uses them, *resulting injuries may be found to result from his own action rather than proximately from a breach of warranty.*" Comment 8 to Section 2-316 [*emphasis added*]. See also Comment 5 to Section 2-715: If the buyer should have discovered or "did in fact discover the defect prior to his use, the injury would *not proximately result from the breach of warranty.*" [*Emphasis added*]. See also Comment 13 to Section 2-314.

Reinforcing the decisive bar of Section 2-607(3) is the precondition of Section 2-714(1), which provides:

> Where the buyer has accepted goods *and given notification (subsection (3) of Section 2-607)* he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable. [Emphasis added.]

Comment 1 to that section states in part: "The *buyer's failure to notify* of his claim under the section on effects of acceptance [Section 2-607], however, *operates to bar his remedies* under either that section or the present section." [Emphasis added.]

The leading cases support Fairhaven. See, e.g., *Standard Alliance Ind. v. Black Clawson Co.*, 587 F.2d 813 (6th Cir. 1978):

> [T]he burden of proof is on the plaintiff to show that notice was given within a reasonable time. [At 823.]

* * *

... If the evidence is clear ... a court can rule as a matter of law that a party failed to give proper notice. [*Id.*]

* * *

An examination of the policy reasons which underlie 2-607 further support our view. Notice of the breach serves two distinct purposes. First, express notice opens the way for settlement through negotiation between the parties.... Second, *proper notice minimizes the possibility of prejudice to the seller by giving him "ample opportunity to cure the defect, inspect the goods, investigate the claim or do whatever may be necessary to properly defend himself or minimize damages* while the facts are fresh in the minds of the parties." [At 826 (emphasis added).]

* * *

We do not know whether this lengthy, acrimonious lawsuit could have been settled beforehand. We do know that Standard Alliance's failure to give notice precluded the possibility of compromise. [*Id.* (emphasis added).]

* *

... Whatever the degree of prejudice to Black Clawson, UCC 2-607's notice requirement is designed to forestall the very difficulties which developed here.... [W]e think that this case demonstrates the wisdom of section 2-607's requirement of prompt notice. [At 827.]

* * *

These events further demonstrate the merit in those cases which hold *merchants to higher standards of good faith than consumers. ... A new car buyer can be excused for failing, in ignorance and exasperation, to notify a car dealer of an obvious breach after persistent repair efforts have ended in failure. A merchant like Standard Alliance cannot be so excused, it should have met sections 2-607's non-rigorous notice requirements.* [*Id.* (emphasis added).]

See also *T. J. Stevenson & Co., Inc. v. 81,193 Bags of Flour*, 629 F.2d 338 (5th Cir. 1980) reh. den. 651 F.2d 779 (5th Cir. 1981) (Section "2-607(3)(a) notice must be evaluated from the perspective of the policy which it seeks to encourage: compromise by the parties; and conduct within the bounds of commercial good faith." At 361); *Mariner Water Etc. v. Aqua Purification Etc.*, 665 F.2d

1066 (D.C. Cir. 1981) ("The time interval elapsing between the discovery of this breach of warranty and Mariner's alleged notification of appellees . . . was . . . in the neighborhood of 5 to 8 weeks. Given these facts, we can hardly say that the District Court's finding that this time lapse exceeded the bounds of reasonableness was clearly erroneous, especially in light of the high standards by which transactions between merchants are measured under the Uniform Commercial Code." At 1069); *K & M Joint Venture v. Smith International Inc.*, 669 F.2d 1106 (6th Cir. 1982) ("The fact that K & M continued to order repair and replacement parts from Caldwell and to pay for them as billed without protest throughout the period when problems were being experienced is inconsistent with the claim that K & M considered Caldwell liable." At 1114); *Eastern Airlines Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976) ("Eastern's commercial good faith is subject to further challenge because it continued to negotiate new contracts and amend old ones throughout the period in which the . . . [problems] occurred." At 979; *Kopper Glo Fuel Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91 (E.D. Tenn. 1977) ("Many factors are relevant to the question of commercial good faith, but of particular importance is evidence showing that the buyer continued to negotiate contracts after the alleged breach occurred. . . ." At 96); *Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 560 P.2d 789 (1977) ("[N]otice . . . was not, as a matter of law, made within a reasonable time after Pace discovered or should have discovered the breach. . . . [A] customer who had purchased some of the lumber complained to Pace that it was defective, thereby putting Pace on notice that problems may have existed with the lumber. This occurred between one to two months prior to the filing of this suit [the means by which notice was given]." At 792); *G & D Poultry Farms Inc. v. Long Island Butter & Egg Co.*, 306 N.Y.S.2d 243, 33 A.D.2d 685 (1969) ("Not only was the delay in asserting said claim unreasonable as a matter of law but, despite knowledge of alleged defects, defendant continued to order additional goods and pay for same without once indicating to

plaintiff that it was dissatisfied with the quality of the merchandise. . . ." At 244); *Donnell & Mudge, Inc. v. Bonita Leather Fashions, Inc.*, 8 UCC Rep. 699 (NY Sup. Ct., App. Term 1971) ("This was acceptance of the goods . . . so as to cast on defendant the burden of establishing notification to the plaintiff of the alleged breach . . . within a reasonable time after discovery. . . . On all the evidence, including the printed requirement on back of each invoice for notice in writing within ten days, it cannot be said that defendant sustained its burden.").

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1960
No. 83-1961

ACTION MANUFACTURING, INC.
Plaintiff, Appellee,

v.

FAIRHAVEN TEXTILE CORPORATION
Defendant, Appellant.

BRAWER BROS. INC.
Third-Party Defendant, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF OF PLAINTIFF, APPELLEE

* * *

Argument

I. THE TRIAL COURT'S FINDING THAT ACTION NOTIFIED FAIRHAVEN OF ITS BREACH IN A TIMELY MANNER WAS NOT CLEARLY ERRONEOUS.

Extensive discovery was undertaken in this case over a three year period. Fairhaven and Brawer filed a multitude of pre-trial motions, including a motion to dismiss. The first time that either complained of the adequacy of Action's notice of breach under § 2-607(3), however, was during Fairhaven's closing argument (T. 8

at 132-137). The trial court considered Fairhaven's claims and found that, under all the circumstances presented by this case, Action's notice to Fairhaven was reasonable and timely. The Court's finding was amply supported by the trial record and should not be set aside. Federal Rules of Civil Procedure, Rule 52(a).

Evidence adduced at trial established that in mid-September of 1979, while in Europe attending a shoe-industry tradeshow, Action's chief executive officer, Lawrence A. Gaffney, was advised by its chief customer that substantial quantities of its laminated nylon products had delaminated from their release paper (T. 2 at 50-54). Gaffney immediately contacted others responsible for Action's management (T. 2 at 54) and initiated an extensive investigation designated to identify the cause of the delamination (please see summary of investigation and production trials at A. 288). That investigation ultimately took more than ten weeks and involved virtually non-stop testing and production trials (T. 2 at 56-66). When, for the first time in the course of the trials, fabric from a second supplier was substituted as a substrate in the place of fabric supplied by Fairhaven, the delamination problem with the nylon laminate was resolved (T. 6 at 47).

Fairhaven admits that it was notified by Action very early in the course of its production trials. Mr. Brawer testified that Fairhaven was notified sometime in October or November but reliable evidence adduced at trial showed that Action notified Fairhaven of the delamination problems at about the same time it became aware of them. On October 2, 1979 John McElroy, an Action vice-president, wrote to Fairhaven's sales representative and impatiently complained about Fairhaven's failure to respond to his earlier request for technical assistance in dealing with the delamination problem (A. 263-264). Indeed, correspondence dating from this period that was a trial exhibit indicates that because of its reduced inventory of finished nylon, Action was in "almost daily contact" with Fairhaven during this period (A. 262).

Fairhaven complains, however, that Action received small quantities of returned nylon products three months earlier from Ameri-

can accounts and should have undertaken an investigation to determine the source of the delamination problem. The trial record established that these earlier returns were quite insubstantial compared to the returns that occurred in the fall and as a result it did not make economic sense for Action to interrupt production to conduct the extensive and expensive plant trials in a matter that had become primarily academic, for it was quickly able to replace the returned goods with first-quality products (A. 457-459). Indeed if the massive returns from Europe had not occurred in the fall, it is unlikely that Action would even have brought forward a claim against Fairhaven. It certainly did not do so in the three-month period from June to September.

Fairhaven suggests that Action's failure to undertake extensive testing in June and to notify Fairhaven thereof was the product of Action's bad faith attempt to inflate its damages. Such a claim is nonsensical and contrary to the evidence adduced at trial. As soon as it learned of substantial quality problems with its nylon laminated products, in September, Action incurred great expense in its increasingly urgent attempts to correct the problems that it was encountering in processing Fairhaven-supplied goods (T. 2 at 56-66).[1] It did not exclude Fairhaven from this process.[2] On the

[1] Please see Action's Exhibit 12-D A 9/28/79 telex in which Gaffney wrote to Action's European distributor: "I know that our problem has been costly to you from the point of view of lost sales. It has also been costly to us in terms of materials wasted and machine time spent on attempting to rectify the problem here." (A. 213) And Action's Exhibit 12F-a 10/5/79 telex in which Gaffney wrote: "The situation is very serious. I have tried for two weeks to identify our problem, without success ... I am so completely frustrated it is hard to express to you ... We must find the problem and correct it. I understand your feelings and accept them. I only ask that you give me some time. I have put my every effort and all my time and money into Action and we had just reached the point of sustained growth when the nylon problem developed. I am positive we can correct the problem — I just need time and some expert help." (A. 215)

[2] Nor was Action reluctant to discuss a negotiated settlement of its claims, prior to bringing forward litigation, although Fairhaven suggests the contrary in its brief (p. 11). Action kept the returned goods at

contrary, Action pleaded with Fairhaven to provide it information as to the lineage of the 70-denier fabric and to secure technical assistance from Milliken, the textile mill from whom it mistakenly believed Fairhaven had purchased the materials (A. 263). While Action received assistance from many others in the trade (A. 288 at paragraphs 8-9), Fairhaven did not respond (2T.-93).

As Fairhaven suggests, the touchstone for analysis of the provisions of § 2-607(3) is the parties obligation to deal in good faith, *Royal Typewriter Co. v. Xerographic Supplies Corp. et al.*, 19 F.2d 1092, 1102 (11th Cir. 1983). The record shows that the overwhelming majority of damages suffered by Action as a result of the defective nylon supplied by Fairhaven occurred in the period immediately after Action asked Fairhaven point-blank if the 70-denier goods it had supplied were first-quality goods purchased from Milliken, as it had represented (A. 263). When Fairhaven did not advise Action that these fabrics had been woven from off-quality yarn supplied by Brawer, Action looked to other possible sources of the delamination problem. Indeed Fairhaven did not even have to disclose Brawer's involvement in order to avoid the damages Action was to sustain. It could merely have purchased first-quality 70-denier fabric from Milliken, as it claims it did with respect to 200-denier nylon fabric supplied to Action. Whether out of feelings of guilt or greed or for some other reason, the record is clear that it chose not to do so.[3]

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its plant and on February 19, 1980 Gaffney wrote to Samuel Fagin, Fairhaven's President:

> The first step should be your inspection of these goods and prompt issuance of a credit on our account.
>
> Second, we can discuss a reasonable method of settling the other damages of lost sales and profits that resulted from the defective nylon. As I told you, I am willing to work with you in arriving at a fair agreement. (A. 252-257).

As late as the time when pre-trial statements were filed in this case, on the other hand, Brawer continued to insist that settlement could only be reached were Action to pay Fairhaven the full amout of its counter-claim (A. 38, 46-27).

[3] Indeed, Fairhaven shielded Brawer's involvement from disclosure to Action for an additional eighteen months. Although the Brawer family

Although Fairhaven complains that Action's failure to undertake extensive testing in June to determine the source of the delamination problem deprived it of the ability to cure the defect or to undertake its own investigation in order to protect itself or to minimize damages (Fairhaven's brief at p. 11), the actions it actually took in September upon receiving notice of Action's investigation show the hollowness of this claim. Not only did it fail to cure the defect by advising Action of the off-quality yarn used to make the 70 denier fabric or even to provide new fabric made from first-quality yarn, it continued to solicit Action's purchase of fabric made from Brawer-supplied yarn. Incredibly, as late as January 16, 1980 (A. 356) Fairhaven supplied Action with 70 denier fabric, not on a Net 60 day credit arrangement as had previously been the case, but according to a memo billing arrangement whereby Action would not have to pay for the goods if it did not find them satisfactory. That Fairhaven was continuing to palm off goods made from Brawer supplied yarn is clear in that this sample was later used in the plant trial and found to be defective. (A. 234-238).

Fairhaven's claims of untimely notice of breach were fully argued before the trial judge and the Court agreed with Action that Action provided timely notice of Fairhaven's breach and that any bad-faith non-disclosure in this case is attributable to Fairhaven. (Please see Courts findings at A. 121 and Action's post-trial memorandum at A. 56.) It is well settled that issues concerning the timeliness or adequacy of notice are questions of fact

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owns 50% of Fairhaven (T. 4 at 103) and had apparently agreed to demnify Fairhaven for losses resulting from its sale of 70 denier nylon fabric to Action, no representative of Brawer attended a February 29, 1980 inspection of the defective goods (T. 2 at 94). Indeed at its own peril, Fairhaven did not file its indemnification action within the period in which it could have done so as a matter of right, pursuant to Rule 14(a) of the Federal Rules of Civil Procedure, but defered doing so for more than a year after it filed its Answer in this case, at a time when the source of the 70 denier nylon yarn used to weave the 70-denier nylon yarn used to weave the 70-denier fabric supplied to Action had become a focus of discovery in the case.

for the trier of fact to decide. *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1102 (11th Cir. 1983); *Mariner Water Renaturalizer of Washington, Inc. v. Aqua Purification Systems, Inc.*, 665 F.2d 1066, 1069 (D.C. Cir. 1981); *Standard Alliance Industries Inc. v. Black Clawson Co.*, 587 F.2d 813, 823 (6th Cir. 1978); *Eastern Airlines Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 962 (5th Cir. 1970). Findings as to a party's good faith – or the lack thereof – are also purley factual findings. *Columbia Standard Corp. v. Rancher's Exploration and Development Inc.*, 468 F.2d 547 (10th Cir. 1972); *Plack v. Baumer*, 121 F.2d 676, 678 (3rd Cir. 1941). As such, the role of this Court is not to reweigh the evidence in a trial de novo, but rather to scrutinize the evidence to ascertain if it affords some reasonable basis for the result achieved. *Evans v. United States*, 319 F.2d 751, 753 (1st Cir. 1963). And when, as here, the findings of the trial court are made in light of the Court's assessment of the credibility of the respective parties, the court's findings are virtually unassailable, Federal Rules of Civil Procedure, Rule 52 (a); *Obolevsky v. Saldana Schmier*, 409 F.2d 52, 55 (1st Cir. 1969). As long as there appears to be some reasonable and discernible basis for the Court's finding – as here when the evidence establishes that Action immediately notified Fairhaven of the problems it experienced in processing Fairhaven goods in the attempt to secure its assistance in identifying the problem – the trial court's finding that timely notice was provided must stand. *Evans v. United States*, 319 F. Supp. 751, 756 (1st Cir. 1963).

United States Court of Appeals for the First Circuit

No. 83-1961

ACTION MANUFACTURING, INC.,
PLAINTIFF, APPELLEE,
v.
FAIRHAVEN TEXTILE CORPORATION,
DEFENDANT, APPELLANT.

Fairhaven's Reply Brief

Action's implication of surprise at Fairhaven's notice argument is ironic and disingenuous. (Action's Brief at 8.) Action always knew the facts on the lateness of the notice; Fairhaven was forced to discover them — or uncover them — in layers. On May 1, 1980 Action sued, alleging that "during the summer and early fall of 1979" (A. 10) it had received Fairhaven goods which it "[s]ubsequent[ly]" discovered to be defective, and that "[i]mmediately upon discovery of said defects" it notified Fairhaven (*id.*). In 1981 Action received an interrogatory specifically asking on what date it had discovered the alleged defects; it answered, "On or about September 17, 1979." (T. 3 at 107-08.) On January 22, 1983 — about 2-¾ years after filing suit — Action answered another interrogatory by revealing for the first time that it had discovered the alleged defects more than three months before September 17, 1979 — specifically, in early June 1979. (T. 3 at 163-172.) On August 23, 1983, during cross-examination of Action's plant manager at trial, evidence surfaced for the first time suggesting that Action had discovered the alleged defects as early as 6 months

before September 17, 1979 — specifically in March 1979. (T. 6 at 117-18). See also pp. 8-10 of Fairhaven's original brief, discussing how Action had ordered more than 200,000 yards of Fairhaven fabric *after* it had discovered the June problems but *before* it had notified Fairhaven.

Respectfully submitted,

FAIRHAVEN TEXTILE CORPORATION

By Its Attorneys,

SHEEHAN, PHINNEY, BASS & GREEN
PROFESSIONAL ASSOCIATION

Date: May 7, 1985 By _____

Edward A. Haffer
1000 Elm Street
Manchester, NH 03101
(603) 627-8115

Certificate of Service

I hereby certify that two copies of this Reply Brief have been sent to Peter Karl Marsh, Esq., Irving Brawer, Esq., and James J. Barry, Jr., Esq.

_____

Edward A. Haffer

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

Action Manufacturing, Inc.,
Plaintiff,

v.

Civil Action
No. C80-204-L

Fairhaven Textile Corporation,
Defendant and
Third-Party Plaintiff,

v.

Brawer Bros., Inc.,
Third-Party Defendant.

FAIRHAVEN'S PRETRIAL STATEMENT

1. *UNCONTESTED FACTS.* During 1978 and 1979, Action (Plaintiff) bought nylon from Fairhaven (Defendant/Third-Party Plaintiff) and at least one other supplier. Fairhaven had bought its nylon in an unfinished state from Brawer Bros. (Third-Party Defendant). In accordance with Action's instructions, Fairhaven had the nylon finished by another company and then had it delivered to Action. On receipt of the nylon, Action put it through manufacturing processes, called tie-coating and adhesive coating, to make pressure sensitive sheets (essentially, nylon laminated to paper) and pressure sensitive tape (essentially, nylon rolls resembling masking tape). Action sold the sheets and tape to customers connected with the shoe industry. Its principal customers were European companies, all controlled by the Jaeger Brothers of West Germany. Through corporate form, the Jaeger

Brothers had and have a substantial interest in Action, owning Action stock, owning the real estate on which Action does business, and owning the machinery with which Action does business.

Action claims that in September 1979 it received customer complaints, principally from the Jaeger Brothers, that its product was defective. Action claims that the nylon was lifting up or "bubbling" from the sheets. Action further claims, but both Fairhaven and Brawer Bros. deny, that Fairhaven nylon caused the problem. Action has sued Fairhaven for breach of implied warranties of merchantability and of fitness for a particular purpose; Fairhaven denies any breach.

Action has not paid for certain nylon supplied by Fairhaven. Action admits that, if it does not prevail in its claim against Fairhaven, it owes Fairhaven $33,543.92. Fairhaven claims, but Action denies, that the amount owed is $37,585.42; and Fairhaven has counterclaimed against Action for breach of contract.

Although Fairhaven and Brawer Bros. assert that Fairhaven nylon did not cause the problem of which Action complains, Fairhaven has brought a third-party suit against Brawer Bros., as Fairhaven's supplier of nylon, for indemnification in the event that Action prevails.

2. *APPLICABLE LAW.* RSA 382-A:2 (the Sales Article of the Uniform Commercial Code). New Hampshire common law on contracts and indemnification.

3. *CONTESTED FACTS.* All other facts are contested.

4. *DISPUTED LEGAL ISSUES.* Other than obvious disagreement over whether the evidence supports the various claims, Fairhaven is not aware of any disputed legal issues.

5. *WITNESSES.* [Omitted.]

6. *DEPOSITIONS.* As of now Fairhaven does not know whether it will be necessary to read any depositions into evidence, but it reserves the right to do so.

7. *EXHIBITS* [Omitted.]

8. *SPECIAL DAMAGES.* Fairhaven claims damages of $37,585.42 plus costs, interest, and counsel fees against Action

for breach of contract. Fairhaven claims damages against Brawer Bros. only for indemnification should Action prevail.

9. *DEMAND AND OFFER.* None pending now, although the parties reserve the right to continue to discuss the possibility of settlement.

10. *VIEW.* Fairhaven requests a view of Action's premises in Gonic, New Hampshire, and will pay the cost in the first instance.

11. *WAIVERS.* Fairhaven waives no claims or defenses.

12. *TRIAL LENGTH.* Two-three weeks.

Respectfully submitted,
FAIRHAVEN TEXTILE CORPORATION
By its Attorneys,
SHEEHAN, PHINNEY, BASS & GREEN
PROF. ASS'N

Dated: March 28, 1983

By: _____
Edward A. Haffer
1000 Elm Street
Manchester, New Hampshire 03101
(603) 668-0300

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

ACTION MANUFACTURING, INC.
Plaintiff,

v. No. C80-204-L

FAIRHAVEN TEXTILE CORPORATION,
Defendant and Third-Party Plaintiff,

v.

BRAWER BROS., INC.,
Defendant.

PRETRIAL STATEMENT

NOW COMES the Plaintiff in the above-captioned matter, Action Manufacturing, Inc., through counsel, and respectfully submits the following pretrial statement in accordance with the provisions of Rule 10 of the Court Rules of the United States District Court for the District of New Hampshire:

(1). (a). It is uncontested that Plaintiff is a N.H. corporation with a principal place of business in Gonic, N.H. and that Plaintiff manufactures pressure-sensitive adhesive materials for primary sale to manufacturers in the shoe industry. It is further uncontested that some of the products manufactured by Plaintiff involve raw materials which include 70-denier and 200-denier nylon fabric.

(b). It is uncontested that Defendant is a New Jersey corporation with a principal place of business in Haledon, N.J. and that Defendant purchases unfinished or greige textile products and arranges to have said products processed or finished for sale to others.

(c). It is uncontested that Third-Party Defendant is a New Jersey corporation with a principal place of business in Haledon, N.J. and that Third-Party Defendant is engaged in various aspects of the textile business including the purchase and sale of man-made yarns, the purchase and sale of fabrics in the unfinished (greige) state, and the arrangement for processing of yarn by others, such as weavers.

(d). It is uncontested that between June 30, 1978 and January 16, 1980 Defendant sold Plaintiff more than 190,000 yards of finished 70-denier nylon fabric and more than 160,000 yards of finished 200-denier nylon fabric.

(e). It is uncontested that Defendant initially contacted Plaintiff through a call from Defendant's salesman, Samuel Werber, to Plaintiff's purchasing agent in 1978 and that Defendant's salesman visited Plaintiff's office in Gonic, N.H. on at least four occasions in 1978 and 1979.

(f). It is uncontested that the 70-denier and 200-denier nylon fabric which is the subject matter of this litigation was sold in the greige or unfinished state by Third-Party Defendant to Defendant prior to the ultimate sale of these goods by the Defendant to the Plaintiff.

(g). It is uncontested that the 70-denier nylon fabric which is the subject matter of this litigation was woven or manufactured by Deering-Milliken for Third-Party Defendant on a commission or contract weaving basis from 70-denier nylon originally purchased by Third-Party Defendant from E. I. du-Pont de Nemours & Co. (Dupont).

(h). It is uncontested that in the period from January 1, 1977 through January 1, 1980, Third-Party Defendant purchased many hundred thousands of pounds of 70-denier nylon yarn from Dupont which was classified by Dupont as first-quality yarn and also purchased during this period many hundred thousands of pounds of 70-denier nylon yarn from Dupont which was classified by Dupont as second-quality yarn.

(i). It is uncontested that in the period from January 1, 1977 through January 1, 1980, Deering-Milliken wove or manufactured many hundred thousands of yards of 70-denier nylon fabric for Third-Party Defendant on a commission or contract weaving basis from 70-denier nylon yarn originally purchased by Third-Party Defendant from Dupont.

(j). It is uncontested that in the period from January 1, 1977 through January 1, 1980, Defendant purchased many hundreds of thousands of 70-denier nylon fabric from Third-Party Defendant in the greige or unfinished state.

(k). It is uncontested that in the period from January 1, 1977 through January 1, 1980, Third-Party Defendant forwarded to Deering-Milliken for weaving many hundreds of thousands of pounds of Dupont 70-denier nylon yarn classified by Dupont as first-quality yarn and during this same period also forwarded to Deering-Milliken for weaving many hundreds of thousands of pounds of Dupont 70-denier nylon yarn classified by Dupont as second-quality yarn.

(l). It is uncontested that Third-Party Defendant claims that available business records do not allow it to trace specific or individual lots of 70-denier nylon yarn purchased from Dupont in the period from January 1, 1977 through January 1, 1980 from the date of purchase by Third-Party Defendant through its being woven into 70-denier nylon fabric by Deering-Milliken to its ultimate sale to the Defendant.

(m). It is uncontested that Lawrence A. Gaffney has been the chief executive officer of Plaintiff from the date of its incorporation in 1977; it is further uncontested that Gaffney had been the chief executive officer of Ideal Tape Co. for many years prior to the formation of Plaintiff corporation and that Ideal showed a profit of $1,553,000.00 in fiscal 1976 and a profit of $1,493,000.00 in fiscal 1977.

(n). It is uncontested that Plaintiff showed a loss of $74,876.24 in fiscal 1980, a loss of $8,457.60 for fiscal 1981 and a profit of $176,005.62 for fiscal 1982.

(2). It is believed by the Plaintiff that pertinent applicable law includes Article 2 of the Uniform Commercial Code and the common law of contracts, torts, agency and conflict of laws as well as 28 U.S.C. § 1332(a).

(3). All relevant facts not stated in ¶ 1 are believed by the Plaintiff to be contested.

(4). Significant disputed issues of law are believed by the Plaintiff to include: (a). Whether the fabric which is the subject matter of this litigation was sold by the Defendant to the Plaintiff subject to a mandatory arbitration provision and as a result is subject as a matter of law to R.S.A. 542.

(b). If the sale of the fabric which is the subject matter of this litigation is subject to a compulsory arbitration provision, whether such a provision is unenforceable on the ground of unconscionability. *Pittsfield Weaving Co. Inc. v. Grove Textiles Inc.*, 121 N.H. 344 (1981).

(c). If the sale of the fabric which is the subject matter of this litigation is subject to an enforceable compulsory arbitration provision, whether such a provision would preclude adjudication of the issues before this Court. *Dunn & Sons Inc. v. Paragon Homes of New England Inc.*, 110 N.H. 215 (1970).

(d). Whether Plaintiff can recover damages for projected lost profits occurring through a retardation of business growth and development which is claimed to be the proximate result of Defendant's wrongful acts. *Mechanical Wholesale Inc. v. Universal-Rundle Corp.*, 432 F.2d 228 (5th Cir. 1970), *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir. 1974), *Petrie-Clemons v. Butterfield*, 122 N.H. 120, (1982).

(e). It is believed by the Defendant that evidence adduced at trial may well develop contested issues of law concerning the respective liabilities of Defendant and Third-Party Defendant such as issues related to Defendant's warranty of fitness for a particular purpose in the face of Third-Party Defendant's disclaimer of any such warranty.

(5). Witness who may be called by the Plaintiff include: [Omitted.]

(6). Plaintiff will likely read portions of the depositions of Irving Brawer and Samuel Werber into evidence.

(7). Exhibits to be offered by the Plaintiff in its direct case include: [Omitted.]

(8). Plaintiff incurred out-of-pocket loss as a result of Defendant's wrongful acts:

(a). Credits issued by Action for Defendant's defective goods 30,488.90
(b). Wasted raw materials and inventory 21,000.00
(c). Airfreight on replacement products 16,450.00
(d). Labor to process defective goods 23,500.00
(e). Storage of defective goods 4,800.00
(f). Travel expense to answer account complaints .. 4,000.00

(9). Representatives of Plaintiff, Defendant and Third-Party Defendant met in the summer of 1981 to discuss the

possibility of a negotiated settlement of the parties' claims. At that time, a principal of Third-Party Defendant indicated that the only possible terms through which a settlement could be reached would require Plaintiff to make a substantial payment to Defendant. Earlier this month, Plaintiff's counsel initiated a discussion with a principal of Third-Party Defendant (who also appears in this action as counsel for Third-Party Defendant) as to settlement only to be told that the only possible terms through which a settlement of the parties claims could be reached would require the Plaintiff to pay the Defendant the amount of the counterclaim. There have been no further settlement discussions. Plaintiff has advanced no formal demand.

(10). While Plaintiff does not request a view of its production facility, Plaintiff does have a bulky exhibit (approximately five pallets of rolls of nylon fabric claimed to be defective) the logistics of exhibiting which may require some consideration.

(11). None.

(12). Six days.

Respectfully submitted,
Action Manufacturing, Inc.,
through counsel

March 25, 1983

Peter Karl Marsh
Concord Legal Advocacy
145 North State Street
Concord, N.H. 03301

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

ACTION MANUFACTURING, INC.
Plaintiff,

v.

FAIRHAVEN TEXTILE CORPORATION,
Defendant and
Third-Party Plaintiff,

v.

BRAWER BROS., INC.,
Third-Party Defendant.

CIVIL ACTION NO. C80-204-L

PRETRIAL SUBMISSION OF BRAWER BROS., INC. PURSUANT TO LOCAL RULE 10.

1. UNCONTESTED FACTS:

The Plaintiff, Action Manufacturing, Inc., is a corporation organized and existing under the laws of the State of New Hampshire with the principal place of business at Pickering Road, Gonic, New Hampshire. The Plaintiff is engaged in the manufacture of pressure sensitive tape for utilization in the shoe industry and has market ability in other areas.

The Defendant Fairhaven Textile Corporation is a corporation organized and existing under the laws of the State of New York with a principal office at 450 7th Avenue, New York, New York. The Defendant Fairhaven is involved in the sale of goods which are utilized at various times by the Plaintiff Action Manufacturing.

The Third-Party Defendant Brawer Bros., Inc. is a corporation organized and existing under the laws of the State of New Jersey

and maintains a principal place of business at 250 Belmont Avenue, Haledon, New Jersey. The Third-Party Defendant, Brawer Bros., Inc., is in the business of purchasing nylon yarn from various suppliers and having said nylon yarn woven at various weavers throughout the Northeast United States and is the major supplier of nylon yarn to the Defendant Fairhaven Textile Corporation.

After its organization in December of 1977, Action Manufacturing, Inc. began the process of manufacturing pressure sensitive tape in the spring of 1978 and actually began to market its goods in the summer of 1978. The manufacturing process developed by Action involves a process which utilized paper and nylon yarn and machinery to perform an operation known as tie-coating first, and second, a laminating process involving the use of adhesives and a bonding of the nylon yarn to the paper.

The Plaintiff, Action Manufacturing, Inc., bought two different types of nylon yarn from Fairhaven Textile Corporation during 1979, namely, 70 denier nylon and 200 denier nylon. Said nylon was supplied to the Plaintiff by the Defendant pursuant to the directives of the Plaintiff.

At some point in 1979 the Plaintiff made a claim against the Defendant Fairhaven Textile Corporation alleging that the nylon fabric supplied by Fairhaven was defective and could not properly be laminated to the paper and as a result of the defective goods the product manufactured by Action could not utilized. Thereafter the Plaintiff failed and refused to pay the Defendant approximately Forty Thousand Dollars ($40,000.00) it owed the Defendant for the purchase of its goods plus interest computed at twenty percent (20%) per annum.

Thereafter, the Plaintiff brought suit against the Defendant Fairhaven Textile Corporation and the Defendant, Fairhaven Textile Corporation, counterclaimed against Action Manufacturing, Inc. the approximately Forty Thousand Dollars ($40,000.00) it was owed by Action for the goods sold and delivered. Subsequent to that, Action filed a third-party complaint against the Defendant

Brawer Bros., Inc. which sounds primarily in the nature of a claim for indemnification since Brawer Bros. was the supplier for Fairhaven.

2. CONTESTED FACTS:

All facts not agreed to in Paragraph 1. are contested.

3. APPLICABLE LAW:

A. Common Law on Contract in the State of New Hampshire;
B. Breach of Contract;
C. Breach of Warranty pursuant to the Uniform Commercial Code;
D. Quantum Valebant.

4. DISPUTED ISSUED OF LAW:

A. Whether the Defendant Fairhaven breached its contract the Plaintiff;
B. Whether the Third-Party Defendant Brawer Bros., Inc. breached its contract with Defendant Fairhaven Textile Corporation;
C. Whether the Uniform Commercial Code with regard to warranties applies.

5. LIST OF WITNESSES: [Omitted.]

6. DEPOSITIONS TO BE READ:

The Defendant Brawer Bros., Inc. reserves the right to read the depositions of any witness who is unavailable at the time to trial. Depositions taken thus far are as follows: [Omitted.]

7. EXHIBITS:

All documentation produced in the course of discovery including, but not limited to: [Omitted.]

8. ITEMIZED STATEMENT OF DAMAGES:

See Pretrial Submission of Action Manufacturing, Inc. and Fairhaven Textile Corporation.

9. STATEMENT OF PLAINTIFF'S LATEST DEMAND AND DEFENDANTS' OFFER:

Plaintiff has demanded $125,000.00.

Defendant Fairhaven has demanded payment in full.

Brawer Bros., Inc. has offered nothing.

10. REQUEST FOR VIEW:

Defendant Fairhaven Textile Corporation and Brawer Bros., Inc. request a view of the manufacturing facility of Action Manufacturing, Inc. and will pay the costs in the first instance.

11. WRITTEN WAIVER OF CLAIMS OR DEFENSES IF ANY:

Brawer Bros., Inc. waives no defenses.

12. TRIAL ATTORNEYS:

ACTION MANUFACTURING, INC.

CONCORD LEGAL ADVOCACY
By: Peter K. Marsh, Esq.
145 North State Street
Concord, N.H. 03301

FAIRHAVEN TEXTILE CORPORATION

SHEEHAN, PHINNEY, BASS & GREEN, P.A.
By: Edward A. Haffer, Esq.
1000 Elm Street
Manchester, N.H. 03101

BRAWER BROS., INC.

LAW OFFICES OF JAMES J. BARRY, JR., P.C.
By: James J. Barry, Jr.
67 Central Street
Manchester, N.H. 03101

Respectfully submitted,
BRAWER BROS., INC.
By its counsel,
LAW OFFICES OF JAMES J. BARRY, JR., PROF. CORP.

March 28, 1983

By: _____
James J. Barry, Jr.
67 Central Street
Manchester, N.H. 03101
(603) 625-2220

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Action Mfg. Inc.,

v. #C80-204-L

Fairhaven Textile Corp., et al.

FINAL PRETRIAL ORDER

It is alleged that in accordance with Action's instructions, Fairhaven had the nylon finished by another company and then had it delivered to Action. On receipt of the nylon, Action put it through manufacturing processes, called tie-coating and adhesive coating, to make pressure sensitive sheets (essentially, nylon laminated to paper) and pressure sensitive tape (essentially, nylon rolls resembling masking tape). Action sold the sheets and tape to customers connected with the shoe industry. Its principal customers were European companies, all controlled by the Jaeger Brothers of West Germany. It is alleged through corporate form, the Jaeger Brothers had and have a substantial interest in Action, owning Action stock, owning the real estate on which Action does business, and owning the machinery with which Action does business.

Action claims that in September, 1979 it received customer complaints, principally from the Jaeger Brothers, that its product was defective. Action claims that the nylon was lifting up or "bubbling" from the sheets. Action further claims, but both Fairhaven and Brawer Bros. deny, that Fairhaven nylon caused the problem. Action has sued Fairhaven for breach of implied warranties of merchantability and of fitness for a particular purpose; Fairhaven denies any breach.

Action has not paid for certain nylon supplied by Fairhaven. Action admits that, if it does not prevail in its claim against Fair-

haven, it owes Fairhaven $33,543.92. Fairhaven claims, but Action denies, that the amount owed is $37,585.31; and Fairhaven has counterclaimed against Action for breach of contract. Although Fairhaven and Brawer Bros. assert that Fairhaven nylon did not cause the problem of which Action complains, Fairhaven has brought a third-party suit against Brawer Bros., as Fairhaven's supplier of nylon, for indemnification in the event that Action prevails.

The applicable law is RSA 382-A:2 (the Sales Article of the Uniform Commercial Code). New Hampshire common law on contracts and indemnification.

The counterclaim against the defendant is in the sum of $37,585.42. The plaintiff's claim is in the approximate sum of $350,000.00. Chances of settlement are poor.

There will be a view on August 15, 1982 at Gonic, New Hampshire. The court will meet with counsel at the courthouse at that time. It will also be necessary either on August 18 or August 19 to return to the premises at Gonic for a demonstration involving a bulky exhibit of approximately 200 yards. It is the court's understanding that a measure graf will be used.

Estimated time of trial is ten days. There will also be an issue as to a protective order regarding expert witnesses.

Trial counsel for the plaintiff is Peter Marsh; counsel for Fairhaven is Edward A. Haffer of Sheehan, Phinney, Bass & Green; counsel for Brawer Bros. Inc. Irving C. Brawer, Esq. and James J. Barry, Jr., Esq.

August 8, 1983

Martin F. Loughlin
U.S. District Judge

Peter Marsh, Esq.
Edward A. Haffer, Esq.
Irving C. Brawer, Esq.
James J. Barry, Jr., Esq.